No. 98-6322

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

ANTONIO TONTON SLACK, Petitioner

v.

E.K. MCDANIEL, WARDEN, ELY (NEVADA) STATE PRISON, and FRANKIE SUE DEL PAPA, ATTORNEY GENERAL OF THE STATE OF NEVADA, Respondents.

Supreme Court, U.S.
FILED
OCT 5 1998
OFFICE OF THE CLERK

APPENDIX FOR PETITION FOR WRIT OF CERTIORARI VOLUME II

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Federal Public Defender
For the District of Nevada
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VOLUME II

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO T. SLACK,

Petitioner,

vs.

E.K. McDANIEL, *et al.*,

Respondents.

Case No. CV-N-95-194-DWH

MEMORANDUM DECISION AND ORDER

Petitioner Antonio T. Slack has submitted a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 attacking the validity of his conviction. Slack asserts seven grounds for relief: (1) insufficient evidence was adduced at trial to support his conviction; (2) he had insufficient notice of his charges since he was charged with "open murder" in an information which did not properly plead each element of first degree murder; (3) the jury was prejudiced by evidence of sexual misconduct; (4) the trial court failed to properly instruct the jury; (5) he was denied effective assistance of counsel; (6) he was denied effective assistance of appellate counsel; and (7) cumulative error.

Slack previously filed a petition for writ of habeas corpus, case number CV-N-91-561-HDM, in which he alleged: (1) insufficient evidence was adduced at trial to support his conviction; (2) the trial court improperly allowed prejudicial evidence of sexual misconduct; (3) the reasonable doubt jury instruction was unconstitutional; and (4) the trial court failed to adequately define the premeditation

instruction. *See Slack v. Director of Nevada State Prisons*, CV-N-91-561-HDM. In that action, Slack filed a motion to stay the proceedings so he could exhaust the following issues before continuing with his federal habeas petition: (1) ineffective assistance of counsel during pre-trial proceedings and trial because counsel failed to raise Franklin violation, and failed to request accomplice or informant instruction; (2) trial court erred in not giving an accomplice jury instruction; (3) trial court erred in allowing co-defendant to testify prior to state making a deal with him; (4) prosecutorial misconduct when prosecutor failed to instruct jury that only fingerprints on the murder weapon were from co-defendant. The court dismissed Slack's first habeas petition without prejudice, and granted him leave to file an application to renew upon exhaustion of all State remedies.

Respondents have moved to dismiss the instant petition alleging abuse of the writ (#67). Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts provides that:

> A second or successive petition may be dismissed . . . if new and different grounds are alleged [and] the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

In the instant petition, grounds two, four (C), five, six and seven were not raised in Slack's previous petition. Therefore, the issue before the court is whether Slack's failure to assert the new ground in his first petition constitutes an abuse of the writ.

In *McCleskey v. Zant*, 499 U.S. 467 (1991), the U.S. Supreme Court defined the respective burdens of pleading abuse of the writ. To meet their burden, the state must with clarity and particularity note the prior writ history, identify the claims that appear for the first time in the current petition, and allege that petitioner has abused the writ. If the state meets their burden, then petitioner must show (1) cause for not raising the claim in the previous petition, e.g., that he was impeded by some objective factor external to the defense, such as governmental interference or the reasonable unavailability of the factual basis for the claim, and (2) actual prejudice resulting from the errors about which he complains. *Bonin v. Calderon*, 77 F.3d 1155, 1158-59 (9th Cir.1996); *Moran v. McDaniel*, 80 F.3d 1261, 1270 (9th Cir.1996).

"Abuse of the writ doctrine examines petitioner's conduct: the question is whether petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition. . . ." *McClesky*, 499 U.S.at 498. An inmate's pro se status does not constitute "an objective external factor" which excuses a petitioner's failure to raise his new claim in prior habeas petitions. *Saahir v. Collins*, 956 F.2d 115, 118 (5th Cir.1992); *Hughes v. Idaho State Board*, 800 F.2d 905, 909 (9th Cir.1986). An inmate's pro se status does not excuse an inmate's ignorance of the law nor establish cause for the purpose of determining whether an inmate abused the writ by failing to raise new claims in prior habeas petitions: there is no constitutional right to counsel in post-conviction proceedings. *Saahir*, 956 F.2d at 118. To show actual prejudice, "petitioner bears 'the burden of showing not merely that the errors at his trial constituted a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with errors of constitutional dimension.'" *White v. Lewis*, 874 F.2d 599, 603 (9th Cir. 1989) *(quoting United States v. Frady*, 456 U.S. 152, 170 (1982)).

As an alternative to showing "cause and prejudice," Slack may attempt to show that dismissal of his instant claim on abuse of the writ grounds will result in a "fundamental miscarriage of justice." Such a showing, however, is very difficult to make. It requires Slack to demonstrate that he is "actually innocent" of the crime with which he was convicted. *See also Smith v. Murray*, 477 U.S. 527, 537 (1986).

Respondents have met their burden in alleging that Slack has abused the writ. Slack must now establish cause and prejudice for his failure to assert the instant claim in his first petition or he must demonstrate that a fundamental miscarriage of justice will result if the court dismisses the case for abuse of the writ. Given the extreme difficulty of showing a "fundamentally unjust incarceration," this court recommends Slack disregard this alternative test and attempt to show cause and prejudice.

IT IS ORDERED that Slack shall have fifteen (15) days from the date of this order within which to file points and authorities addressing whether he can overcome the abuse of the writ bar that is applicable to grounds two , four(C), five, six and seven of the instant amended habeas petition. No extensions of time will be granted.

Dated this 10 day of March, 1998.

UNITED STATES DISTRICT JUDGE

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Federal Public Defender
Las Vegas, Nevada

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CLERK
BY _____ DEPUTY

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Attorney for Slack

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

ANTONIO T. SLACK, Petitioner, DIRECTOR, NDOP, et al., Respondents.	CV-N-95-194-DWH **MOTION FOR RECONSIDERATION OF MEMORANDUM DECISION AND ORDER ENTERED ON MARCH 11, 1998**

Petitioner, Antonio Slack, by and through his counsel of record, Franny A. Forsman, Federal Public Defender, Deborah A. Trevino, Assistant Federal Defender, respectfully moves this court to reconsider, alter and amend its Memorandum Decision and Order entered March 11, 1998. This motion is made pursuant to Rule 59 of the Federal Rules of Civil Procedure and is based upon the attached memorandum of points and authorities and the entire file in this matter. Petitioner respectfully requests a hearing

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in this matter. Undersigned counsel anticipates approximately thirty minutes for oral argument.

DATED this 25th day of March, 1998.

Respectfully Submitted,

DEBORAH A. TREVINO
Asst. Federal Public Defender

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The court has entered an order determining that Respondents have met their burden in alleging that petitioner has abused the writ with regard to grounds two, four(C), five and seven of the instant amended petition. On the basis of this determination, the court has ordered petitioner to file points and authorities addressing whether he can overcome the abuse of the writ bar. This motion for reconsideration follows. The court's order is premised upon an error of law which requires correction and reconsideration.

A. The state has not alleged facts sufficient to establish that an abuse of the writ has occurred.

The state argues that Rule 9(b) of the Rules Governing Section 2254 cases requires that the grounds asserted in the amended petition which are unexhausted or were not included in the previous federal petitions should be dismissed under the abuse of the writ doctrine. The state's pleading does not furnish any ground for dismissing any part of the amended petition.

B. The amended petition is not a "second or successive" one under Rule 9(b).

Initially, in order to preserve the question for review, petitioner submits that Rule 9(b) does not apply to his case at all, because the amended petition before the court is not a "second or successive" one within the meaning of the rule, since the previous federal petition was dismissed without prejudice for

exhaustion. Petitioner recognizes that the Court of Appeals has adopted a contrary position. Farmer v. McDaniel, 98 F.3d at 1556-1557. Every other Court of Appeals that has addressed this issue, however, has held that a petition is not subject to Rule 9(b) as a "second or successive" one if previous petitions have been dismissed without prejudice for exhaustion. McWilliams v. State of Colorado, 121 F.3d 573, 575 (10th Cir. 1997); Benton v. Washington, 106 F.3d 162, 164 (7th Cir. 1996); Camarano v. Irvin, 98 F.3d 44, 46-47 (3d Cir. 1996); In re Gasery, 116 F.3d 1051, 1052 (5th Cir. 1997); Woods v. Whitley, 933 F.2d 321, 322 (5th Cir. 1991); Jones v. Estelle, 722 F.2d 159, 168 (5th Cir. 1983) (en banc) cert. denied, 466 U.S. 976 (1984); Dickson v. Maine, 101 F.3d 791, 791 (1st Cir. 1996) (per curiam).

C. The A.E.D.P.A. has superseded Rule 9(b) of the Rules governing § 2254 cases.

This case is governed by the A.E.D.P.A. because it was commenced after April 25, 1996. In Farmer the Ninth Circuit held that Rule 9(b) applies, in limited part, to §2254 actions that had previously been dismissed without prejudice. The A.E.D.P.A. provides that a successor petition cannot be filed with the district court unless a panel of the Court of Appeals authorizes such an action. 28 U.S.C. §2244(b)(3). In a case following the enactment of the A.E.D.P.A. the Ninth Circuit held that previous petitions which have been dismissed without prejudice on exhaustion grounds do not trigger §2244(b)(3). In re Turner, 101 F.3d 1323 (9th Cir. 1997). In other words, a dismissal without

prejudice does not make the next §2254 action a successor petition.

The Court of Appeals for this circuit has created an intra-circuit conflict with Farmer by holding that a "second or successive" petition under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) -- which uses the identical language in 28 U.S.C. §2244(b) that is used in, and was adopted from, Rule 9(b) -- does not refer to a petition filed after a previous petition has been dismissed without prejudice for purposes of exhaustion. In re Turner, supra at p. 323. In order to preserve this issue for review, see Sup. Ct. Rule 10.1(a) (conflicting decisions of Court of Appeals as basis for review on certiorari); Fed. R. App. P., Rule 35(a)(1) (securing uniformity of decision as ground for hearing en banc); petitioner submits that no part of the instant amended petition can be subject to dismissal under Rule 9(b).

This position is also supported by the decision of the Court of Appeals in Calderon v. United States District Court (Taylor), _ F.3d ___, 1998 WL 24138 (9th Cir. January 28, 1998), in which the court held that a district court has discretion to hold the exhausted part of a habeas petition in abeyance while dismissing the unexhausted claims for exhaustion. An amended petition, adding the claims following exhaustion, could not rationally be considered a "second or successive" one under Rule 9(b) because there would be no difference in substance between that situation

and the one presented here where the previous petition was dismissed without prejudice in its entirety.

The Turner decision makes the jurisprudence in this circuit on this issue fundamentally incoherent. It is clear that the AEDPA was intended to, and did, impose restrictions on the filing of "second or successive" habeas corpus petitions in 28 U.S.C. §2244(b) that are more stringent than the preexisting caselaw on abuse of the writ. E.g., Felker v. Turpin, ___ U.S. ___, 116 S.Ct. 2333, 2340 (1996); cf. Schlup v. Delo, 513 U.S. 298 (1995); McCleskey v. Zant, 499 U.S. 467 (1991). Under Turner, however, it does not matter how many previous federal petitions have been dismissed for exhaustion: a new petition under the AEDPA is not a "second or successive" one under 28 U.S.C. §2244(b). Turner and Farmer can be harmonized if this court concludes that the Farmer decision is limited to cases pre-dating the enactment of the A.E.D.P.A. A contrary conclusion ignores the holding in Turner a case more applicable to the instant action because it was controlled by the A.E.D.P.A.

D. There is no basis for finding abuse as a result of presentation of unexhausted claims.

As shown above, the amended petition before this court is fully exhausted. As a result, there is no basis for dismissal, with or without prejudice. The basis for the theory of abuse of the writ in the non-McCleskey context -- that is, when there has been no "first round of federal habeas," McCleskey v. Zant, 499 U.S. at 490 -- is (as originally articulated by the state in this

case) that the petitioner is attempting to evade resolution of his constitutional claims by repeatedly filing mixed petitions, thus avoiding a decision on the merits due to the necessity of dismissal for exhaustion. Petitioner here was not, and has not been, seeking to evade such a resolution. There is accordingly no basis for the state to seek dismissal either for exhaustion or on the basis of abuse.

Petitioner submits that a hearing on that issue is necessary before final resolution of any question involving petitioner's substantial rights.

II. CONCLUSION

For the reasons stated above and in petitioner's opposition to respondents motion to dismiss, petitioner respectfully requests that this Court alter or amend its Memorandum Decision and Order entered on March 11, 1998.

Dated this 25th day of March, 1998.

Respectfully submitted,

Deborah A. Trevino
Assistant Federal Public Defender
Attorney for Petitioner

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

ANTONIO T. SLACK, Petitioner, -vs- DIRECTOR, NDOP, et al., Respondents.	CV-N-95-194-DWH

CERTIFICATE OF MAILING

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on March 25, 1998, she served a copy of the above and foregoing document by placing a true and correct copy into the United States mail, postage prepaid and addressed to the persons named below:

Julie Slabaugh
Deputy Attorney General
100 N. Carson Street
Carson City, NV 89701

Antonio T. Slack
#31395
Ely State Prison
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Ely, NV 89301

Pamela M. Ramage
Legal Assistant

RECEIVED
MAY 0 1 1998
Federal Public Defender
Las Vegas, Nevada

FILED
98 APR 29 PM 1:56
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BY _____ DEPUTY

FRANNY A. FORSMAN
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(702) 388-6577

Attorney for ANTONIO SLACK

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

ANTONIO SLACK, Petitioner, v. E.K. McDANIEL et al., Respondents.	CV-N-95-194-DWH NOTICE OF APPEAL

NOTICE is hereby given that Antonio Slack, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment in a civil case dated March 31, 1998.

DATED this 28th day of April, 1998.

JOHN C. LAMBROSE
Asst. Federal Public Defender

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender and is a person of such age and discretion as to be competent to serve papers.

That on April 28, 1998, she served a copy of the attached NOTICE OF APPEAL by placing a copy in a self addressed envelope postage prepaid to the addressee below:

Julie A. Slabaugh
Deputy Attorney General
100 N. Carson Street
Carson City, NV 89701-4717

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Pamela M. Ramage
PAMELA M. RAMAGE

Slack -

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Counsel for Petitioner

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

***

ANTONIO T. SLACK,

Petitioner,

vs.

Director NDOP, et al.,

Respondents.

CV-N-95-194-DWH

APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE

COMES NOW, petitioner, Antonio T. Slack, and submits this application for a certificate of probable cause.

This application is based on the following points and authorities, as well as the pleadings and papers on file in this case.

Dated this 8th day of May, 1998.

Respectfully submitted,

JOHN C. LAMBROSE
Asst. Federal Public Defender

I. POINTS AND AUTHORITIES

A. Facts

The petitioner commenced this action on March 27, 1995. CR 1. On February 13, 1997 this court appointed counsel. CR 43. Thereafter, the petitioner filed his third amended petition.[1] The respondent moved to dismiss the third amended petition on procedural grounds. Specifically the respondent contended that grounds two, four(C), five, six and seven were abusive and sought a dismissal of those grounds.[2] The respondent did not specifically plead or allege how Slack's previous conduct regarding his federal writ history was indicative of an intent on his part to withhold claims in order to "vex or harass" the respondents or "delay" the final resolution of his federal remedy. Farmer v. McDaniel, 98 F.3d 1548, 1556 (9th Cir. 1996) (citations omitted). Instead, the respondent simply argued that Slack's failure to present the allegedly abusive claims in his previous 1991 § 2254 action resulted in per se abuse. See motion to dismiss at p. 9 ll. 22-28.

The respondent also contended that grounds two, four (C), three, most of five, six and seven were not exhausted and that fact rendered the third amended petition as "mixed" in nature requiring a dismissal of the instant case.[3] The petitioner opposed the motion to dismiss arguing that no ground pled in the third amended petition was abusive. Opposition to Motion to Dismiss. Slack also argued against a dismissal on exhaustion grounds as to any of the claims raised in the petition. Id.

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[1] The grounds raised in Slack's third amended petition are set out in this Court's March 30, 1998 Order at pages 2 and 3. CR. 74.

[2] Slack's third amended petition alleged that grounds two and 4(C) were not exhausted. CR 74.

[3] The respondent did not plead any other procedural defenses. Moreover, although the respondent did not affirmatively seek a dismissal of this case without prejudice it must necessarily be assumed that a dismissal on exhaustion grounds is construed to be without prejudice. This court's order is in accord. CR 74 at p.7.

On March 11, 1998 the court entered an interim order finding grounds two, four(C) , five, six and seven abusive. CR 72. The court's conclusion was predicated on the fact that Slack's third amended petition contained grounds (two, four(c) five, six and seven) that were not pled in Slack's previous federal petition which had been dismissed on exhaustion grounds. Id. At p. 2 (comparing 1991 claims with claims in instant action). Without any further scrutiny of Slack's conduct -- that is without any consideration of whether petitioner had any intent to vex, harass, or delay-- the court concluded that the abusive grounds would be dismissed absent a demonstration of cause and prejudice. Id.. Citing McCleskey v. Zant, 499 U.S. 467 (1991).[4]

On March 26, 1998 Slack asked the court to reconsider its decision arguing that: (1) the respondent failed to allege sufficient facts to support an abuse of the writ; (2) Slack's third amended petition was not a "second or successive petition"; (3) abuse of the writ is inapposite to this case because the claims alleged in the third amended petition cannot be dismissed on exhaustion grounds. Motion to reconsider, filed March 26, 1998.[5]

On April 2, 1998 this court entered an order dismissing the action without prejudice. CR 74. The court concluded that grounds two, four(C), five, six and seven were abusive and dismissed those grounds accordingly. Id. This court did not resolve the respondent's exhaustion argument on these claims. The court did not discuss how Slack's previous federal writ history warranted such a harsh sanction. It simply adopted the respondent's position that Slack's failure to plead the claims in his 1991 petition was a per se abuse of the writ. CR 72. Finally, the court found that ground three was unexhausted and that

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[4] The court did not address Slack's argument that the McCleskey standard could not apply in this case. See Opposition to motion to dismiss.

[5] Slack had previously argued that the court could not dismiss any of the grounds under the exhaustion doctrine but the court's March 11, 1998 order did not resolve that issue.

fact rendered the petition "mixed" in nature requiring a dismissal of the instant action without prejudice. Id.

B. The amendments to § 2253 do not apply to cases filed prior to the AEDPA's effective date.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, signed into law on April 24, 1996, enacted the present 28 U.S.C.A. § 2253 (Supp. 1997, requiring a "certificate of appealability" in order for an appeal to be taken from a final order in a habeas proceeding. See 28 U.S.C.A. § 2253(b) (requiring " substantial showing of the denial of a constitutional right"). Prior to the enactment of the AEDPA, § 2253 required a "certificate of probable cause" in order for an appeal to be taken from a final order in a habeas proceeding. See 28 U.S.C.A. § 2253 (1994).

The portions of the AEDPA which apply to non-capital cases have been held to be inapplicable to cases already pending when the Act was passed. Lindh v. Murphy, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997) (the portions of § 2254(d) dealing with noncapital cases are inapplicable to cases already pending when the Act was passed); Jeffries v. Wood, 114 F.3d 1484 (9th Cir. 1997) (the AEDPA does not apply retroactively to cases filed in federal courts in Ninth Circuit prior to Act's effective date).

Slack filed his petition on May 30, 1995, well before the date the AEDPA was passed (April 24, 1996). CR 4. Accordingly, his case is governed by the pre-Act version of § 2253 (requiring a certificate of probable cause). The amendments to § 2253 promulgated by the AEDPA cannot apply retroactively to Slack's cases. See Lindh, and Jeffries, see also Greenwalt v. Stewart, 105 F.3d 1268 (9th Cir. 1997) (applying "certificate of probable cause" standard to dismissal of petition filed April 23, 1996).

C. Slack is entitled to a certificate of probable cause.

As shown above, however, the AEDPA does not apply to this matter. A CPC is appropriate where a petitioner can show a "substantial showing of the denial of a federal right." Lynch v. Blodgett, 999 F.2d 401, 403 (9th Cir. 1993) (quoting Barefoot v. Estelle, 463 U.S. 880, 893, 103 S.Ct. 3383, 3394-95, 77 L.Ed.2 1090) (1993)). To satisfy the "substantial showing" standard, a petitioner "must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." Barefoot, 463 U.S. at 893 n.4, 103 S.Ct. At 3395 n.4 (citations omitted).

1. It is at least debatable among jurists of reason that this court erred when it concluded that grounds two, four(C), five, six and seven were abusive.

a. The amended petition is not a "second or successive" one under Rule 9(b).

Initially, in order to preserve the question for review, petitioner submits that Rule 9(b) does not apply to his case at all, because the amended petition before the court is not a "second or successive" one within the meaning of the rule, since the previous federal petitions were dismissed without prejudice for exhaustion. Petitioner recognizes of course that the Court of Appeals has adopted a contrary position. Farmer v. McDaniel, 98 F.3d at 1556-1557. See also, Motion for Reconsideration at p. 3, filed March 26, 1998. Every other Court of Appeals that has addressed this issue, however, has held that a petition is not subject to Rule 9(b) as a "second or successive" one if previous petitions have been dismissed without prejudice for exhaustion. McWilliams v. State of Colorado, 121 F.3d 573, 575 (10th Cir. 1997); Benton v. Washington, 106 F.3d 162, 164 (7th Cir. 1996); Camarano v. Irvin, 98 F.3d 44, 46-47 (3d Cir. 1996); In re Gasery, 116 F.3d 1051, 1052 (5th Cir. 1997); Woods v. Whitley, 933 F.2d 321, 322 (5th Cir. 1991); Jones v. Estelle, 722 F.2d 159, 168 (5th Cir. 1983) (en banc) cert. denied, 466 U.S. 976 (1984); Dickson

v. Maine, 101 F.3d 791, 791 (1st Cir. 1996) (per curiam). In fact, the Court of Appeals for this circuit has created an intra-circuit conflict with Farmer by holding that a "second or successive" petition under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) -- which uses the identical language in 28 U.S.C. §2244(b) that is used in, and was adopted from, Rule 9(b) -- does not refer to a petition filed after a previous petition has been dismissed without prejudice for purposes of exhaustion. In re Turner, 101 F.3d 1323, 1323 (9th Cir. 1997). Further, the Supreme Court's intervening decision in Calderon v. Thompson, ___ U.S. ____, 1998 WL 204593 (U.S.) treats the definition of a "second or successive" petition as settled, referring only to petitions filed after a previous petition has been addressed on the merits. That decision undercuts the decision in Farmer and this court should not follow the Farmer definition of "second or successive" petition. In any event, in order to preserve this issue for review, see Sup. Ct. Rule 10.1(a) (conflicting decisions of Court of Appeals as basis for review on certiorari); Fed. R. App. P., Rule 35(a)(1) (securing uniformity of decision as ground for hearing en banc); petitioner submits that no part of the instant amended petition can be subject to dismissal under Rule 9(b) at all.[6]

The Turner decision makes the jurisprudence in this circuit on this issue fundamentally incoherent. It is clear that the AEDPA was intended to, and did, impose restrictions on the filing of "second or successive" habeas corpus petitions in 28 U.S.C. §2244(b) that are more stringent than the preexisting caselaw on abuse of the writ. E.g., Felker v. Turpin, _ U.S. __, 116 S.Ct. 2333, 2340 (1996); cf. Schlup v. Delo, 513 U.S. 298 (1995); McCleskey v. Zant, 499 U.S.

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[6]This position is also supported by the decision of the Court of Appeals in Calderon v. United States District Court (Taylor), 134 F.3d 981 (9th Cir. 1998), in which the court held that a district court has discretion to hold the exhausted part of a habeas petition in abeyance while dismissing the unexhausted claims for exhaustion. An amended petition, adding the claims following exhaustion, could not rationally be considered a "second or successive" one under Rule 9(b); but there would be no difference in substance between that situation and the one presented here where the previous petitions was dismissed without prejudice in their entirety. Moreover, the petitioner's case is bolstered by the fact that he sought a stay in his earlier federal proceeding which was certainly appropriate under the then-existing rule in the Ninth Circuit. See Exh. B at tab 5; see also Neuschafer v. Whitley, 860 F.2d 1470 (9th Cir. 1988).

467 (1991). Under Turner, however, it does not matter how many previous federal petitions have been dismissed for exhaustion: a new petition under the AEDPA is not a "second or successive" one under 28 U.S.C. §2244(b). Under the Court of Appeals' decision in Farmer, however, a petition can be treated as a "second or successive" one under the less stringent, pre-AEDPA law, and thus abuse could allegedly be found although it could not even be considered under current law.

b. Abuse of the writ does not apply to this case.

In dismissing the above grounds this court relied on the rule announced in Farmer v. McDaniel, supra. In Farmer, the Ninth Circuit held that in very limited circumstances a particular claim pled in § 2254 petition can be dismissed even though the petitioner's previous § 2254 action had been dismissed without prejudice. Id. at p. 1560. The holding in Farmer does not apply to this case for several reasons. First, Farmer's previous federal writ history included three previous petitions spanning a period of nearly eight years. Id. At pp. 1549-1551. Slack, on the other hand, filed only one previous federal petition.[7] Second, Farmer was represented by counsel in each of his previous forays into federal court. Id. At p. 1348-1350. Slack's previous federal petition was litigated pro se. Id. Third, Farmer's previous federal litigation resulted in a more significant expenditure of federal judicial resources. Slack's previous federal petition was filed on November 27, 1991 and dismissed without prejudice less than ninety days later. See, Exh. A, Slack v. Director, CV-N-91-561-HDM at CR 1. The only "litigation" during that brief period of time involved the respondent's motion for extension of time (CR 4) to respond to the court's December 10, 1991 order directing that a response to the petition be filed no later than December 27, 1991. CR 3. On February 5, 1992 (five days prior to the respondent's new deadline) the petitioner asked to have the action held in abeyance while he returned to state court to exhaust his

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[7]The previous federal file is attached to these points and authorities at Exh. A.

claims. CR 5. The court, instead, opted to dismiss the action without prejudice. CR 7. This occurred on February 19, 1992 and on July 10, 1992 Slack filed his state post-conviction petition. The final, and most compelling difference between Slack's procedural history and the history outlined in Farmer is that Slack was never admonished, in any written order, that the failure to present all of his known claims for relief could result in a bar of those claims in a later federal action. Compare Exhibit A with 98 F.3d at p. 1550 n. 2.

The Ninth Circuit's decision in, Farmer, is explicitly very limited in scope. The court observed as much in three different sections of the opinion. 98 F.3d at p. 1549, 1554, and 1560. In Farmer the Ninth Circuit distilled its very narrow holding as follows:

> In short, what we hold, and all that we hold, is that the district court was not precluded as a matter of law from considering whether Farmer's conduct in failing to allege grounds in prior petitions that he alleged the third time around (if he did) was abusive solely on account of the fact that his prior petitions were not reviewed on the merits.

Id. at p. 1560 (emphasis supplied). The Ninth Circuit then remanded the case to the district court in order to determine whether Farmer's amended petition in his third federal §2254 action contained abusive grounds for relief. Id. However, the Court was careful to note that the fact that a previous federal petition was not reviewed on the merits is "an important factor that informs the court's discretion in applying the abuse of the writ doctrine." Id. At p. 1549. It is not dispositive and cannot, standing alone, end the inquiry. Slack's procedural history does not match the Farmer case nor does it bear any similarity other than Slack had a previous § 2254 petition dismissed without prejudice because it contained unexhausted claims. This court's per se finding of abuse in Slack's case is contrary to Farmer's admonition that before such a conclusion can be reached a thorough inspection of the previous writ history is mandated so the court's exercise of discretion is "informed". Id.

Abuse of the writ as a procedural bar, focuses on the conduct and motive of the

petitioner relative to his previous federal § 2254 litigation. "Abuse of the writ doctrine examines petitioner's conduct. The question is whether petitioner possesses, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition and pursue the matter throughout the habeas process." 98 F.3d at 1560, quoting McCleskey v. Zant, 499 U.S. 467, 498 (1991) (emphasis in original). This court can take judicial notice of the fact that at least one judge in the federal district of Nevada is in accord with this interpretation of Farmer. See, Duckett v. Godinez, 67 F.3d 734, 741 (9th Cir. 1995) (observing that a court can take judicial notice of other state or federal proceedings). In Pellegrini v. McDaniel case no. CV-S- 96-400 PMP(LRL), the district court was asked to find several of the petitioner's claims abusive because they were not presented in a previous federal petition. The court refused and predicated its decision on the fact that the previous action was litigated pro se, lasted less than four months, was filed in order to obtain a stay of execution, and was ultimately dismissed without prejudice. See exhibit B attached hereto.

c. If abuse of the writ applies to this case the respondent did not demonstrate that an abuse was committed.

This court concluded that abuse has been established as a matter of law because of the existence of a previous federal petition that was dismissed for exhaustion. This court relied, in part, on McCleskey. Petitioner submits that McCleskey overruled Sanders v. United States, 373 U.S. 1 (1963), only with respect to cases in which there has been a "first round of federal habeas," McCleskey, 499 U.S. at 490, and that Sanders states the applicable standard of abuse in non-McCleskey situations. This position is consistent with the decision of the Court of Appeals in Farmer. The court did not reach the question whether any of the claims in the amended petition were new, "or if they are, whether there has been any abuse of the writ. That is entirely for the district court to decide, in its discretion." Farmer, 98 F.3d at 1460 (footnote omitted). If the McCleskey standard of abuse applied in this situation, the Court of Appeals would have had no

reason to reserve the question of abuse: any new claim would be abusive and the only issue would be whether petitioner could establish an excuse. There would also be no occasion for this court to exercise its discretion: if a new claim in a petition filed after the dismissal of previous petitions for exhaustion were subjected to the McCleskey standard, abuse would be demonstrated, as a matter of law, not as a matter of discretion.

Petitioner submits that the standard for establishing abuse in the non-McCleskey context remains the standard of Sanders. This court's conclusion that McCleskey overruled Sanders in toto -- without any analysis and sub silentio -- is simply not credible, in light of the undisputed fact that the Rule 9(b) codification of Sanders remains in effect for pre-AEDPA cases. See Lonchar v. Thomas, ___ U.S. ___, 115 S.Ct. 1293 (1996) (federal courts should not impose procedural requirements beyond those incorporated in habeas rules). It is equally impossible to conclude, in light of the emphasis placed in McCleskey on the costs of repetitive federal review of state convictions, that the McCleskey decision -- again sub silentio -- intended to erase all distinctions for abuse purposes between successor petitions filed after a complete round of federal habeas corpus review and petitions filed after a previous petition has been dismissed "without prejudice" for exhaustion and no federal review at all has occurred. Nothing in the Farmer or McCleskey decisions supports so radical a departure from prior law; and such a departure from previous law would not be consistent with the "evolutionary process" of abuse of the writ jurisprudence, see Felker v. Turpin, _ U.S. __, 116 S.Ct. 2333, 2340 (1996), but would be a quantum leap of logic.[8]

It is clear that McCleskey abuse does not apply in this case, because there was no prior

---

[8]The per se rule could lead to truly surreal results. For example, a petitioner could file an amended petition as of right, under Fed. R. Civ. P., Rule 15(a); and the court could be forced by the state to conduct abuse of the writ analysis for failure to include claims in the initial petition which is superseded by the "second or successive" amended petition. In short, every amendment to every petition would be subjected to the same kind of abuse analysis that would be conducted if the petitioner had already received a complete round of federal court review of the claims on the merits in a first petition. Nothing in the Supreme Court's jurisprudence suggests so irrational a result.

determination of the merits. The second type of abuse may arise under the circumstances suggested by Sanders, upon which Rule 9(b) is based. This type of abuse requires a showing that a new claim in a petition was "deliberately withheld" from a previous petition, former 28 U.S.C. § 2244(b); Sanders, 373 U.S. at 18, or that the petitioner "deliberately abandon[ed]" the claim in a hearing on a previous petition, id., citing Wong Doo v. United States, 265 U.S. 239, 241 (1924); or that the "only purpose" of the petition is "to vex, harass or delay," Sanders, 373 U.S. at 18; or that the petitioner is deliberately engaging in needless piecemeal litigation. Sanders, 373 U.S. at 18.

The Farmer decision explicitly acknowledged the continuing validity of these standards for non-McCleskey abuse:

> A federal court need not consider habeas claims previously unlitigated in federal court if it determines that the petitioner (1) made a conscious decision deliberately to withhold them from a prior petition, (2) is pursuing needless piecemeal litigation, or (3) has raised the claims only to vex, harass, or delay. Where there is no affirmative indication in the record that the petitioner made a conscious decision deliberately to withhold his claim, proceed by piecemeal litigation, to vex or harass or annoy the court or the state, a second petition raising a new claim is not an abuse of the writ.
>
> The state has presented no evidence that any of the factors outlined in *Sanders* are present. Moreover, there is nothing in the history of this case to indicate that Hamilton deliberately withheld his claim in the hope of being granted two hearings instead of one.

Farmer, 98 F.3d at 1559, quoting Hamilton v. Vasquez, 882 F.2d 1469, 1473 (9th Cir. 1989) (citations omitted).

This analysis of Sanders abuse is the only one that fits into the text and structure of the applicable statutes and rules. The Farmer decision emphasized the language of Rule 9(b) in concluding that abuse of the writ could be found, even if no prior proceeding on the merits of a previous petition had been conducted, relying on the language "[a] second or successive petition may be dismissed . . . if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." Farmer,

98 F.3d at 1555. The Advisory Committee Notes (1976) to Rule 9(b), quoted in Farmer, explicitly adopt the Sanders analysis of the standard of abuse under this theory:

> With reference to a successive application asserting a new ground or one not previously decided on the merits, the court in Sanders noted:
>
> In either case, full consideration of the merits of the new application can be avoided [only] if there has been an abuse of the writ * * * and this the Government has the burden of pleading. * * *
>
> Thus, for example, if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, * * * he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground.
>
> 373 U.S. at 17-18 [83 S.Ct. at 1078]

Farmer, 98 F.3d at 1555-1556. The Notes conclude that Rule 9(b) will not "eliminate a remedy to which the petitioner is rightfully entitled," and emphasize the language of Sanders holding that

> Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.
>
> 373 U.S. at 19 [83 S.Ct. at 1078].

Farmer, 98 F.3d at 1556.

Thus the non-McCleskey prong of Rule 9(b) incorporates the Sanders standards of abuse, as the Advisory Committee Notes clearly indicate. This conclusion is also the only one consistent with the settled principle of statutory construction that an enactment which employs a term of art (like "abuse of the writ") which has been judicially defined is presumed to have incorporated the judicial interpretation of the term. E.g., McDermott Intern., Inc. v. Wilander, 498 U.S. 337, 342 (1991); Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 813 (1989).

...

...

...

2. It is at least debatable among jurists of reason that this court erred when it concluded that ground three was not exhausted.

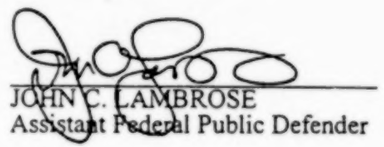
Ground three of the amended petition challenges the constitutionality of the use of evidence of sexual misconduct designed to prejudice the jury. Here, respondent argues that ground three is unexhausted because the claim was not presented as a violation of Slack's Fifth and Fourteenth Amendments. The record belies that assertion. That Slack's right to due process is impinged by this violation of his right to a fair trial cannot come as surprise to the state. It is clear that the analysis employed at the appellate level inherently implicated due process and fair trial claims. The "unexhausted claims" upon which respondent relies cannot reasonably be said to have fundamentally altered the legal claim of prosecutorial misconduct or to reflect an attempt by petitioner to withhold facts or legal theory from the state courts. Petitioner's attempts to state as many specifics as possible underlying his claim of prosecutorial misconduct can hardly be said under the circumstances to have caused the claim to become unexhausted.

Moreover, the exhaustion doctrine does not require that a federal habeas corpus petitioner frame a claim in precisely the same manner in which it was set forth in the state court pleadings. See Williams v. Holbrook, 691 F.2d 3, 6 (1st Cir. 1982) (petitioner "not precluded from some reformulation of the claims . . . made in the state courts"). Respondent must not be allowed to extrapolate Slack's claims to the point of requiring that the federal petition be identical to the prior state petitions. See Engle v. Isaac, 456 U.S. 107, 123-124 n.25 (1982) ("a creative appellate judge could almost always distill an unexhausted due process claim . . . [W]e are reluctant to interpolate an unexhausted claim not directly presented by the petition. Rose v. Lundy does not compel such harsh treatment of habeas petitions."). Thus, although respondent has attempted to "mix" Slack's petition, see Lacey v. Gabriel, 732 F.2d 7, 11-12 (1st Cir.) ("district court [could not] 'mix' Lacy's petition for him."), cert. denied, 469 U.S. 861 (1984), the rule requiring liberal construction of prisoners' pleadings should not be applied to Slack's disadvantage.

II. CONCLUSION

For the reasons stated Slack respectfully asks this Court for an order granting a certificate of probable cause.

Respectfully submitted,



JOHN C. LAMBROSE
Assistant Federal Public Defender

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

ANTONIO SLACK Petitioner, -vs- E.K. McDANIEL, et al., Respondents.	CV-N 95-194-DWH

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on May 8, 1998, she served a copy of the above and foregoing document by placing a true and correct copy into the United States mail, postage prepaid and addressed to the persons named below:

Julie Slabaugh Deputy Attorney General Criminal Justice Division 100 North Carson Street Carson City, NV 89701-4717	Antonio Slack #3395 Ely State Prison P.O. Box 1989 Ely, NV 89301



District	Off.	Docket No. Yr.	Docket No. Number	OR	Filing Date Mo.	Filing Date Day	Filing Date Yr.	J	Nature Suit	B 23	Judge	Mag.	Jury Dem	ARB	MDL Docket	Docket Yr.	Docket Number
0978	3	91	00561	1	11	27	91	3	530		7809					91	00561EDM

CLOSED

CAUSE: HABEAS CORPUS - 28 USC 2254

PETITIONER	RESPONDENT
SLACK, ANTONIO T.	DIRECTOR, NEVADA DEPARTMENT OF PRISONS

EXEMPT FRCP 16(b)

ATTORNEYS

FOR PETITIONER:

Antonio T. Slack
Inmate #31395
IN PRO PER
Ely State Prison
P.O. Box 1989
Ely, NV 89301-1989

FOR RESPONDENT:

ATTORNEY GENERAL STATE OF NEVADA
HEROES MEMORIAL BUILDING
CAPITOL COMPLEX
CARSON CITY, NV 89710
KEVIN G. HIGGINS, Deputy
(702) 687-3529
For Rs.

[X] CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID			STATISTICAL REPORTS PROCESSED
	DATE	RECEIPT NUMBER	C.D. NUMBER	Filing _____
				Termination _____
				Change _____

UNITED STATES DISTRICT COURT DOCKET

DC-111S (7/88)

DATE	NR.	CV-N-91-561-HDM ANTONIO TONTPROCEEDINGS v. DIRECTOR, NV DEPT OF PRISONS
11/27/91	1	PETITION for Writ of H/C obo P. (AT) mj
--	2	MOTION/ORDER: (HDM) ORD tht P may proceed in F/P; Clk shl file petn & shl srv Rs by cert mail; Rs shl not hv to answr ad petn unless crt ords. Cps dist 12/02/91. mj
--	--	JS-5 (AT) mj
12/02/91	-	SUBD TO HDM: (ITEM #1 - Does he wish to have a respns filed?) (AT) mj
12/10/91	3	ORDER TO SHOW CAUSE: (HDM) ORD tht Clk of Crt forward cpys of petn & this Ord to the AG of St of NV and to R, Dir NV Dept of Prisons; FUR ORD tht Rs shl file a respns to the petn on/or before 12/27/91 on the merits of the petn; Rs shl srv a cpy of the respn upon the petnr; FUR ORD tht if any pldng/or paper submitted to be fld & considr by Crt does not include a cert of svc upon rs or Cnsl for Rs, it will not be considrd by the Crt & will be retnd to petnr. Cps dist 12/11/91 (AT) mj
12/20/91	4	MOTION/ORDER: (HDM) ORD tht Rs shl hv ext to & incl 2/10/92 w/in to answr or otherwise plead to the petn for writ of H/C; FUR ORD tht no fur ext of time shl be grntd. Cps dist 12/23/91. (AT) mj
2/5/92	5	MOTION to stay H/C proceedngs obo P. (m) (AT) mj
2/12/92	--	SUBD TO HDM: (ITEM #3 - no respns & #5) (AT) mj
2/18/92	6	MINUTE ORDER (HDM): ORD that P's mtn to stay H/C procdgs (#5) for for hrg 2/19/92 @ 8:45 a.m.; cnsl for Rs sh arrange for telephonic presence of P (cps dist) (AT). rm
2/20/92	7	MINUTE ORDER (HDM): ORD this actn dism w/o prejudice; P grntd lv to file application to renew upon exhaustion of all state remedies. (cps dist) (AT) rm.
---	--	JS-6. (AT) rm

RECEIVED
NOV 15 1991
CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO T. SLACK
Name

31395
Prison Number

ELY STATE PRISON
Place of Confinement

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ANTONIO TONTON SLACK, Petitioner
(Full Name)

vs.

DIRECTOR, NEVADA DEPARTMENT OF PRISONS, Respondent
(Name of Warden, Superintendent, jailor or authorized person having custody of petitioner.)

and

The Attorney General of the State of NEVADA, Additional Respondent.

(NOTE: If petitioner is attacking a judgment which imposed a sentence to be served in the future, petitioner must fill in the name of the state where the judgment of conviction was entered.)

CV-N----91-561-H

CASE NO. (To be supplied by the Clerk)

PETITION FOR A WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. §2254 BY A PERSON IN STATE CUSTODY

1) Name and location of the court which entered the judgment of conviction under attack: EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, LAS VEGAS, NEVADA

2) Date judgment of conviction was entered: MAY 1990

3) Case number: C92060.

4) Length and terms of sentence: TWO (2) CONSECUTIVE 5-YEARS-TO-LIFE SENTENCES

a) In a capital case where death penalty has been imposed, date of scheduled execution NOT APPLICABLE

5) Are you presently serving a sentence imposed for a conviction other than the conviction under attack in this motion?

Yes ☐ No ☒

6) Nature of the offense involved: (all counts)

SECOND DEGREE MURDER WITH USE OF DEADLY WEAPON

7) What was your plea? (check one)

a) Not Guilty ☒ b) Guilty ☐ c) Nolo Contendere ☐

8) If you entered a plea of guilty pursuant to a plea bargain, state the terms and conditions of the agreement:

NOT APPLICABLE

9) If you were found guilty after a plea of not guilty, was the finding made by: (check one)

a) A jury ☒ b) A judge without a jury ☐

10) Did you testify at trial (if any)? Yes ☒ No ☐

11) Did you appeal from the judgment of conviction?

Yes ☒ No ☐

12) If you did appeal, state the name and location of the court where the appeal was filed, the result, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): NEVADA SUPREME COURT NO. 21421 DISMISSED APPROX. OCT/NOV
PETITIONER DOES NOT POSSESS FINAL ORDER AT THIS TIME

13) If you did not appeal, explain briefly why you did not: _____

DID APPEAL / NOT APPLICABLE

a) Did you seek permission to file a late appeal?

Yes /___/ No /XXX/ WASN'T NECESSARY

14) State concisely every ground on which you claim that you are being unlawfully held. Summarize briefly the facts supporting each ground. If necessary, you may attach up to two extra pages stating additional grounds or supporting facts. You should raise in this petition all available grounds for relief which relate to the conviction under attack.

CAUTION

Before proceeding in a federal court, you are required to exhaust the remedies available to you in the state courts as to each ground on which you request action by the federal court.

A)(1) Ground One: INSUFFICIENT EVIDENCE WAS ADDUCED AT TRIAL TO CONVICT THE DEFENDANT WITH SECOND DEGREE MURDER WITH USE OF A DEADLY WEAPON.

(2) Supporting Facts: (Without citing legal authority or argument state briefly the facts which support your claim.)

INCIDENT INVOLVED ACCIDENTAL SHOOTING, TESTIMONY SUPPORTS SAME, CONVICTION ON SECOND DEGREE MURDER IS WITHOUT ESSENTIAL ELEMENTS OF OFFENSE FOR SECOND DEGREE MURDER WITH USE OF A DEADLY WEAPON, INTENT AND POSSESSION OF WEAPON LACKING FACTUAL EVIDENCE OR TESTIMONY. ALSO SEE PETITIONER'S OPENING BRIEF FROM STATE COURT DIRECT APPEAL ON THIS CLAIM WHICH WAS CONSTITUTIONALLY RAISED ON BASIS OF JACKSON V. VIRGINIA, 443 U.S. 307 (1979).

(3) Statement of Exhaustion of State Remedies as to Ground One:

Direct Appeal

(a) If you appealed from the judgment of conviction did you raise this issue? Yes /XXX/ No /___/

(b) If you did not raise this issue in your direct appeal, explain briefly why you did not: _____

DID RAISE / NOT APPLICABLE

Post-Conviction Proceedings

(c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court? Yes /___/ No /XXXX/

(d) If your answer to (c) is "Yes", state the type of motion or petition, the name and location of the court where the motion or petition was filed, the result and date of the court's decision: NOT APPLICABLE

(e) Did you receive an evidentiary hearing on your motion or petition? Yes /___/ No /___/ NOT APPLICABLE

(f) Did you appeal from the denial of your motion or petition? Yes /___/ No /___/ NOT APPLICABLE

(g) If your answer to (f) is "Yes", state whether this issue was raised in the appeal, Yes /___/ No /___/, N/A and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): NOT APPLICABLE

(h) If your answer to questions (e), (f) or (g) is "No", briefly explain: DIRECT APPEAL IN STATE SUPREME COURT EXHAUSTED ISSU.

Other Remedies

(i) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to the issue: DIRECT APPEAL IN STATE SUPREME COURT EXHAUSTED ISSUE

B)(1) Ground Two: THE TRIAL COURT IMPROPERLY ALLOWED PREJUDICIAL EVIDENCE OF A SEXUAL RELATIONSHIP BETWEEN THE DEFENDANT AND THE TWELVE YEAR OLD VICTIM.

(2) Supporting Facts: (Without citing legal authority or argument state briefly the facts which support your claim.)

EVIDENCE OF PRIOR BAD ACTS AND UNCHARGED MISCONDUCT VIOLATED DEFENDANT'S RIGHT TO A FAIR TRIAL UNDER FOURTEENTH AMENDMENT AS FURTHER ARGUED IN THE DIRECT APPEAL, SEE ALSO DEFENDANT'S OPEN ING BRIEF IN STATE DIRECT APPEAL.

(3) Statement of Exhaustion of State Remedies as to Ground Two:

Direct Appeal

(a) If you appealed from the judgment of conviction did you raise this issue? Yes XXXX/ No /__/

(b) If you did not raise this issue in your direct appeal, explain briefly why you did not: DID RAISE / NOT APPLICABLE

Post-Conviction Proceedings

(c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court? Yes /__/ No /XXX/

(d) If your answer to (c) is "Yes", state the type of motion or petition, the name and location of the court where the motion or petition was filed, the result and date of the court's decision: NOT APPLICABLE

(e) Did you receive an evidentiary hearing on your motion or petition? Yes /__/ No /__/ NOT APPLICABLE

(f) Did you appeal from the denial of your motion or petition? Yes /__/ No /__/ NOT APPLICABLE

(g) If your answer to (f) is "Yes", state whether this issue was raised in the appeal, Yes /__/ No /__/, N and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): NOT APPLICABLE

(h) If your answer to questions (e), (f) or (g) is "No", briefly explain: DIRECT APPEAL IN STATE SUPREME COURT EXHAUSTED

Other Remedies

(i) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to the issue: STATE SUPREME COURT RULED ON ISSUE EXHAUSTING REMEDIES

C)(1) Ground Three: THE REASONABLE DOUBT INSTRUCTION TO JURY BY TRIAL COURT VIOLATED DUE PROCESS CLAUSE OF U.S. AND STATE CONSTITUTION (CAGE VS. LOUISIANA)

GROUND FOUR: TRIAL COURT ERRED BY NOT ADEQUATELY DEFINING PREMEDITATION IN JURY INSTRUCTIONS REGARDING MURDER.

(2) Supporting Facts: (Without citing legal authority or argument state briefly the facts which support your claim.)

GROUND THREE: REASONABLE DOUBT INSTRUCTION VIOLATED DUE PROCESS CLAUSE OF BOTH THE U.S. AND NEVADA CONSTITUTIONS, SEE CAGE V. LOUISIANA, 111 S. CT. 328 (1990).

GROUND FOUR: TRIAL COURT VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHTS AS SHOWN IN DEFENDANT'S STATE COURT SUPREME COURT DIRECT APPEAL OPENING BRIEF (UNITED STATES V. GILBREATH, 452 F. 2d 992, 5th CIR. 1971), BY FAILING TO ADEQUATELY DEFINE "PREMEDITATION" IN JURY INSTRUCTIO

(3) Statement of Exhaustion of State Remedies as to Ground Three:

Direct Appeal

(a) If you appealed from the judgment of conviction did you raise this issue? Yes XXXX No /__/

(b) If you did not raise this issue in your direct appeal, explain briefly why you did not: DID RAISE / NOT APPLICABLE

Post-Conviction Proceedings

(c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court? Yes /__/ No XXXX

(d) If your answer to (c) is "Yes", state the type of motion or petition, the name and location of the court where the motion or petition was filed, the result and date of the court's decision: NOT APPLICABLE

(e) Did you receive an evidentiary hearing on your motion or petition? Yes /__/ No /__/ NOT APPLICABLE

(f) Did you appeal from the denial of your motion or petition? Yes /__/ No /__/ NOT APPLICABLE

(g) If your answer to (f) is "Yes", state whether this issue was raised in the appeal, Yes /__/ No /__/, N and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): NOT APPLICABLE

(h) If your answer to questions (e), (f) or (g) is "No", briefly explain: STATE SUPREME COURT APPEAL EXHAUSTED ISSUE

Other Remedies

(i) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to the issue: STATE SUPREME COURT APPEAL EXHAUSTED ISSUE

15) Have all grounds for relief raised in this petition been presented to the highest state court having jurisdiction?

Yes /XXXX No /___/

16) If you answered "No" to question 15, state which grounds have not been so presented and briefly give your reason(s) for not presenting them: NOT APPLICABLE

17) Have you previously filed any type of petition, application or motion in a federal court regarding the conviction under attack? Yes /___/ No /XXXX/ If "Yes", state the location of the court, the type of proceeding, the issues raised, the result and the date of the court's decision for each petition, application or motion filed: NOT APPLICABLE

18) Do you have any petition, application, motion or appeal now pending in any court regarding the conviction under attack? Yes /XXXX/ No /___/. If "Yes", state the name of the court and the nature of the proceeding: NOT APPLICABLE

19) Were you represented by an attorney at any time during the course of your arraignment and plea, trial (if any), sentencing, appeal (if any), or during the preparation, presentation or consideration of any petitions, motions or applications which you filed with respect to this conviction? Yes/XXXX/ No /___/. If "Yes", state the name(s) and address(es) of any such attorney(s), the proceedings in which you were so represented and whether said attorney(s) was/were of your own choosing or if appointed by the court: FROM ARRAIGNMENT THRU TRIAL= MICHAEL GARDNER DEPUTY CLARK COUNTY PU ON DIRECT APPEAL = SAME COUNSEL ABOVE (MICHAEL GARDNER, DEP.P.D.)

Wherefore, petitioner prays that the court grant him such relief to which he may be entitled in this proceeding.

REQUESTED 18 USC £ 3006A-a
Signature of Attorney (if any)

/Antonio J. Kuck
Signature of Petitioner

(Attorney's full address and telephone number.)

DECLARATION UNDER PENALTY OF PERJURY

The undersigned declares under penalty of perjury that he is the petitioner in the above action, that he has read the above pleading and that the information contained therein is true and correct. 28 U.S.C. §1746. 18 U.S.C. §1621.

Executed at ELY, NEVADA (Location) on NOVEMBER 12, (Date), 1991

/Antonio J. Kuck
(Signature)

2

MOTION AND ORDER UNAVAILABLE

3

CAROL C. FITZGERALD
CLERK
BY _____ DEPUTY

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AND FILED

1991

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ANTONIO TONTON SLACK,

Petitioner,

v.

DIRECTOR, NEVADA DEPARTMENT OF PRISONS and THE ATTORNEY GENERAL OF THE STATE OF NEVADA,

Respondents.

CV-N-91-561-HDM

ORDER TO SHOW CAUSE

Petitioner is in state custody, having been sentenced in May 1990. Based on the petition filed herein, and good cause appearing:

It is hereby ORDERED that the clerk of the court forward copies of said petition in this order to the Attorney General of the State of Nevada and to the respondent, Director, Nevada Department of Prisons.

It is further ORDERED that the respondents file a response to the petition on or before the 27th day of December, 1991, on the merits of the petition. Respondents shall serve a copy of the response upon Petitioner.

/ / /

It is further ORDERED that if any pleading or other paper submitted to be filed and considered by the court does not include a certificate of service upon Respondents or counsel for Respondents, it will not be considered by the court, and it will be returned to the petitioner.

Dated this 9th day of December, 1991.

UNITED STATES DISTRICT JUDGE

DEC 26 1991
OFFICE OF THE ATTORNEY GENERAL
U.S. DISTRICT COURT
DISTRICT OF NEVADA
DEC 26 199
ATTORNEY
DEC 20 1991
CAROL C. FITZGERALD, CLERK
BY DEPUTY
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DEC 19 1991
CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA
DEPUTY

FRANKIE SUE DEL PAPA
Attorney General
KEVIN G. HIGGINS
Senior Deputy Attorney General
Criminal Justice Division
Capitol Complex
Heroes' Memorial Building
Carson City, Nevada 89710
Telephone: (702) 687-3529

Attorney for Respondents.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

ANTONIO TONTON SLACK, Petitioner, vs. DIRECTOR, NDOP, et al., Respondents.	Case No. CV-N-91-561-HDM MOTION FOR ENLARGEMENT OF TIME (FIRST REQUEST)

Respondents, by and through counsel, FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada, hereby respectfully move this court for an order granting a forty-five (45) day enlargement of time to and including February 10, 1992, in which to file and serve their response to petitioner's Petition for Writ of Habeas Corpus.

This motion is based upon the provisions of Rule 6(b) of the Federal Rules of Civil Procedure and the attached affidavit of counsel as well as all other papers, documents, records, pleadings and other materials on file herein.

. . .

. . .

There have been no prior enlargements of respondents' time to file said response, and this motion is made in good faith and not for the purposes of delay.

RESPECTFULLY SUBMITTED this 18th day of December, 1991.

FRANKIE SUE DEL PAPA
Attorney General

By: for Kevin G. Higgins
Senior Deputy Attorney General
Criminal Justice Division

THERE SHALL BE NO FURTHER EXTENSIONS GRANTED.

IT IS SO ORDERED:

UNITED STATES DISTRICT JUDGE

DATED: December 19, 1991

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General of the State of Nevada and on this 18th day of December, 1991, I served a copy of the foregoing MOTION FOR ENLARGEMENT OF TIME together with the AFFIDAVIT OF COUNSEL, by mailing a copy thereof to:

ANTONIO TONTON SLACK, #31395
Ely State Prison
P.O. Box 1989
Ely, Nevada 89301-1989

5

ANTONIO TONTON SLACK
ELY STATE PRISON
P.O. BOX 1989
ELY, NEVADA 89301

Petitioner In Pro Se

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * * * *

ANTONIO TONTON SLACK,

Petitioner,

DIRECTOR, NDOP, et al.,

Respondents. /

Case No. CV-N-91-561-HDM

MOTION TO STAY THESE HABEAS PROCEEDINGS

COMES NOW, petitioner, ANTONIO T. SLACK, in pro se and with the assistance of an inmate law clerk, MICHAEL R. EVANS #26022, to respectfully move this Honorable Court for an order staying these habeas proceedings until this petitioner has exhausted the following issues in a state court proceeding, pursuant to Rose v. Lundy, 455 U.S. 509 (1982) and Harris v. Reed, 109 S.Ct. 1038 (1989):

1) Ineffective assistance of counsel during all pretrial and trial proceedings as follows:

a) Failure to raise a Franklin violation, in that the deal made with petitioner's co-defendant was not completed before his testimony was allowed;

b) That counsel failed to offer and/or request an accomplice and/or informant instruction.

2) That the trial court erred in not instructing the jury on an accomplice instruction and his testimony.

3) That the trial court erred in allowing the petitioner's co-defendant to testify prior to the deal being made with him and the state being completed.

4) That there was prosecutorial misconduct, in that the prosecution withheld from the jury the fact that the only finger prints found on the murder weapon were those of the co-defendant's.

Petitioner respectfully request one (1) year to litigate these issues in a state court proceeding so that he may present these issues with the issues that he has already presented in his filed habeas.

Dated this 31st day of January, 1992.

respectfully submitted by,

Antonio T. Slack
ANTONIO TONTON SLACK

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 31 day of January, 1992, that I placed a true and correct copy of the foregoing motion in the United States mail, postage prepaid, addressed as follows: Frankie Sue Del Papa, Nevada Attorney General, Capitol Complex, Carson City, Nevada 89710.

Antonio T. Slack
ANTONIO TONTON SLACK
ELY STATE PRISON
P.O. BOX 1989
ELY, NEVADA 89301

Petitioner In Pro Se

/ / / / /

/ / / / /

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * * * *

ANTONIO TONTON SLACK,
Petitioner,

vs.

DIRECTOR, NDOP, et al.,
Respondents. /

Case No. CV-N-91-561-HDM

PURPOSED ORDER

After reading the petitioner's motion to stay these habeas proceedings and good cause appearing,

IT IS HEREBY ORDERED that these proceedings are stayed for a period of one (1) year or until the parties notify this court otherwise.

IT IS SO ORDERED.

Dated this _____ day of _____, 1992.

UNITED STATES DISTRICT JUDGE

/ / / / /

/ / / / /

/ / / / /

6

U.S. DISTRICT COURT
DISTRICT OF NEVADA
FILED
FEB 18 1992
CAROL C. FITZGERALD, CLERK
BY _____ DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

ANTONIO TONTON SLACK, Petitioner(s), vs. DIRECTOR, NEVADA DEPARTMENT OF PRISONS, et al., Respondent(s).	CV-N-91-561-HDM MINUTES OF THE COURT February 18, 1992

PRESENT: HONORABLE HOWARD D. McKIBBEN, U.S. DISTRICT JUDGE

Deputy Clerk: Bette Stewart Reporter/Recorder: None Appearing

Counsel for Petitioner(s): None Appearing

Counsel for Respondent(s): None Appearing

MINUTE ORDER IN CHAMBERS:

Petitioner's Motion to Stay Habeas Proceedings (#5), filed February 5, 1992, is set for telephonic hearing on Wednesday, February 19, 1992, at 8:45 a.m. Counsel for respondents shall arrange for telephonic presence of petitioner.

IT IS SO ORDERED.

CAROL C. FITZGERALD, CLERK

By: Bette Stewart
Deputy Clerk

FILED
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RECEIVED
CAROL C. FITZGERALD
CLERK
BY
DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

ANTONIO TONTON SLACK, Plaintiff(s), vs. DIRECTOR, NEVADA DEPARTMENT OF PRISONS, et al., Defendant(s).	)	CV-N-91-561-HDM MINUTES OF THE COURT February 19, 1992

PRESENT: HONORABLE HOWARD D. McKIBBEN, U.S. DISTRICT JUDGE

Deputy Clerk: Bette Stewart Reporter/Recorder: Donna Casey

Counsel for Plaintiff(s): Antonio Tonton Slack, in Pro Se

Counsel for Defendant(s): Kevin G. Higgins

PROCEEDINGS: Telephonic Hearing on Petitioner's Motion to Stay Habeas Proceedings (#5)

9:10 a.m. Court convenes.

Court and counsel confer.

There being no objection by either party,

IT IS ORDERED that this action is dismissed without prejudice. Petitioner is granted leave to file an application to renew upon exhaustion of all State remedies.

9:15 a.m. Court adjourns.

CAROL C. FITZGERALD, CLERK

By: Bette Stewart
Deputy Clerk

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APR 17 1998
Federal Public Defender
Las Vegas, Nevada

ENTERED AND SERVED
APR 17 1998
CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA
BY _____ DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

DAVID MICHAEL PELLEGRINI,

Petitioner,

vs

E.K. McDANIEL, et al.,

Respondents

Case No. CV-S-96-400-PMP(LRL)

ORDER

Respondents have filed a motion to dismiss (#44) the amended petition for writ of habeas corpus (#43), in which Petitioner Pellegrini challenges the validity of his state court conviction and death sentence. Respondents contend that based on *Farmer v. McDaniel*, 98 F.3d 1548 (9th Cir. 1996), nearly all of the grounds for relief stated in the amended petition are barred from review as an abuse of the writ. Respondents have properly stated the procedural history which shows that Petitioner had a prior federal habeas corpus action that was dismissed for procedural reasons, to-wit: *Pellegrini v. Whitley*, CV-S-89-246-PMP. The decision in *Farmer* holds that abuse of the writ analysis is not precluded when a prior federal habeas corpus proceeding is dismissed for procedural reasons, as compared to a denial on the merits. However, for the reasons stated below, Petitioner's prior action simply cannot be a basis for a finding of abuse of the writ. Hence, the motion to dismiss shall be denied. Although Petitioner's opposition to the motion was filed late, the opposition shall be allowed.

Petitioner's conviction and sentence became final when the Nevada Supreme Court issued its remittitur on December 20, 1988, denying Petitioner's direct appeal. A warrant for Petitioner's execution was issued setting March 31, 1989, as the execution date. Four days prior to the scheduled execution, Petitioner *pro se* filed a petition for writ of habeas corpus and motion for stay of execution in this court. A hearing was immediately held and the execution stayed to allow Petitioner an opportunity to pursue a state post-conviction proceeding. The federal proceeding was subsequently stayed and then dismissed a few months later. In total, the federal action was open only three and a half months. The acknowledged purpose of that action was to stop an execution that was going to occur before Petitioner could even pursue a state post-conviction proceeding; the goal of the prior federal action was not to have the validity of his state court conviction and death sentence reviewed on the merits. Under these circumstances, Petitioner's conduct does not evidence a failure to act diligently in stating all grounds for relief in the first federal action.

> Abuse-of-the-writ doctrine examines *petitioner's* conduct. The question is whether petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition and pursue the matter through the habeas process.

Farmer, 98 F.3d at 1560, quoting *McCleskey v. Zant*, 499 U.S. 467, 498 (1991)(emphasis original). To hold Petitioner bound to only those grounds stated in the prior action, an action that was begun solely so that he could commence state court post-conviction proceedings before being put to death, is absurd. The motion to dismiss shall be denied.

Petitioner has filed a motion (#50) to hold in abeyance, alternatively to extend the time, for filing a motion for an evidentiary hearing. The scheduling order (#21) directed Petitioner to request an evidentiary hearing at the same time that he opposed a motion to dismiss or filed a traverse to the answer. The motion shall be granted to the extent that Petitioner shall file his motion for an evidentiary hearing at the same time but separately from the traverse.

IT IS THEREFORE ORDERED that Respondents' motion to strike (#52) Petitioner's late opposition is DENIED. Respondents' motion to dismiss (#44) is DENIED. Respondents shall file an answer to the amended petition within sixty (60) days. Petitioner shall have forty-five (45) days to then file a traverse. Respondents shall have thirty (30) days to then file a reply.

IT IS FURTHER ORDERED that Petitioner's motion (#50) is GRANTED to the extent that he shall file his motion for an evidentiary hearing at the same time but separately from the traverse. Respondents shall file a response/opposition to the motion at the same time but separately from their reply to the traverse. Petitioner shall have twenty (20) days in which to then file a reply in support of the motion for an evidentiary hearing.

Dated this 14th day of April 1998.

PHILIP M. PRO
United States District Judge

U.S. DISTRICT COURT
DISTRICT OF NEVADA
ENTERED & SERVED
1 9 1998
CLERK, U.S. DISTRICT COURT
DEPUTY
BY

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO SLACK,

Petitioner,

vs.

E.K. McDANIEL, *et al.*,

Respondents.

Case No. CV-N-95-194-DWH

DENIAL OF CERTIFICATE OF PROBABLE CAUSE

Petitioner Antonio Slack has filed a notice of appeal from the decision of this Court denying his petition for writ of habeas corpus. Pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, the notice of appeal will also be considered as a request for the issuance of a certificate of probable cause. The Court of Appeals may not issue its ruling until this court first determines whether Slack has adequate grounds to pursue his appeal. Fed.R.App.P. 22(b); *McCarthy v. Harper*, 449 U.S. 1309 (1981); *Christian v. Rhode*, 41 F.3d 461, 470 (9th Cir.1994).

To obtain a certificate of probable cause to appeal the Court's denial of his petition, Slack need not show that he ought to prevail on the merits of his claims. He must, however, make a substantial showing of the denial of a federal right, and he must demonstrate that there exist legal issues "debatable among jurists of reason." In other words, Slack must show that a court could resolve the issues in a different manner, or that the questions he seeks to raise on appeal "are adequate to deserve encouragement to proceed further." *Barefoot v. Estelle*, 463 U.S. 880, 893 & n. 4 (1983). Since

Slack's appeal would not raise any substantial issue, his request for a certificate of probable cause will be denied.

IT IS THEREFORE **ORDERED** that a certificate of probable cause is hereby **DENIED**.

Dated this 11 day of May, 1998.

UNITED STATES DISTRICT JUDGE

FILED
'98 APR 29 PM 1:56
LARRY R. WILSON
CLERK
BY

FRANNY A. FORSMAN
Federal Public Defender
JOHN C. LAMBROSE
Assistant Federal Public Defender
330 South Third Street, Ste 700
Las Vegas, NV 89101
(702) 388-6577

Attorney for ANTONIO SLACK

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

ANTONIO SLACK, Petitioner, v. E.K. McDANIEL et al., Respondents.	CV-N-95-194-DWH NOTICE OF APPEAL

NOTICE is hereby given that Antonio Slack, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment in a civil case dated March 31, 1998.

DATED this 28th day of April, 1998.

JOHN C. LAMBROSE
Asst. Federal Public Defender

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender and is a person of such age and discretion as to be competent to serve papers.

That on April 28, 1998, she served a copy of the attached NOTICE OF APPEAL by placing a copy in a self addressed envelope postage prepaid to the addressee below:

Julie A. Slabaugh
Deputy Attorney General
100 N. Carson Street
Carson City, NV 89701-4717

Antonio Slack
#31395
Ely State Prison
PO Box 1989
Ely, NV 89301

PAMELA M. RAMAGE

U.S. DISTRICT COURT
DISTRICT OF NEVADA
ENTERED & SERVED
MAR
CLERK, U.S. DISTRICT COURT
BY DEPUTY

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

FILED
98 MAR 31 AM 8:24
LANCE S. WILSON
CLERK
BY DEPUTY

ANTONIO A. SLACK,

Plaintiff,

V.

E.K. MCDANIEL, et al, et al.,

Defendants.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: CV-N-95-194-DWH

__ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered it's verdict.

__ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

XX **Decision by Court.** This action came to be considered before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that respondents' motion to dismiss (#67) is **granted, and this action is dismissed without prejudice.**

March 31, 1998
Date

LANCE S. WILSON
Clerk

Marti Campbell
(By) Deputy Clerk

U.S. DISTRICT COURT
DISTRICT OF NEVADA
ENTERED & SERVED
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CLERK, U.S. DISTRICT COURT
BY DEPUTY

FILED
98 MAR 30 PM 4:16
LANCE S. WILSON
CLERK
BY DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO A. SLACK, Petitioner,	)	Case No. CV-N-95-194-DWH
vs.	)	
E.K. McDANIEL, *et al.*, Respondents.	)	MEMORANDUM DECISION AND ORDER

Petitioner Antonio A. Slack has filed an amended petition for habeas relief pursuant to 28 U.S.C. § 2254 (#65). Respondents move to dismiss claiming several grounds are unexhausted and abusive (#66). The Court ordered Slack to file points and authorities addressing whether he can overcome the abuse of the writ bar that is applicable to grounds two, four(C), five, six and seven (#72). Slack has filed a motion for reconsideration of the court order (#73). For the reasons set forth below, the Court finds grounds two, four(C), five, six and seven are abusive and ground three is unexhausted. Therefore the petition must be dismissed.

BACKGROUND

In February 1990, a jury found Slack guilty of second degree murder with use of a deadly weapon. *See* #16, ex.12. Slack was sentenced to two consecutive life terms with the possibility of parole. *See* #16, ex.13. Slack filed a direct appeal with the Nevada Supreme Court which was dismissed. *See* #16, ex.22.

Slack then filed his first federal habeas petition with this court. *See* #16, ex.25. In his first habeas petition, Slack alleged: (1) insufficient evidence was adduced at trial to support his conviction; (2) the trial court improperly allowed prejudicial evidence of sexual misconduct; (3) the reasonable doubt jury instruction was unconstitutional; and (4) the trial court failed to adequately define the premeditation instruction. In that action, Slack filed a motion to stay the proceedings so he could exhaust the following issues before continuing with his federal habeas petition: (1) ineffective assistance of counsel during pre-trial proceedings and trial because counsel failed to raise Franklin violation, and failed to request accomplice or informant instruction; (2) trial court erred in not giving an accomplice jury instruction; (3) trial court erred in allowing co-defendant to testify prior to state making a deal with him; (4) prosecutorial misconduct when prosecutor failed to instruct jury that only fingerprints on the murder weapon were from co-defendant. The court dismissed Slack's first habeas petition without prejudice, and granted him leave to file an application to renew upon exhaustion of all state remedies. *See Slack v. Director of Nevada State Prisons*, CV-N-91-561-HDM.

In 1992, Slack filed a state habeas petition in the Eighth Judicial District Court of Nevada. *See* #16, ex.31. The district court denied the petition, *see* #16, ex.37, and the Nevada Supreme Court dismissed Slack's appeal. *See* #16, ex.39.

In 1995, Slack filed his second federal habeas petition with this Court (#4). After the Court appointed counsel for Slack (#43), he filed an amended habeas petition (#64). In Slack's amended habeas petition he clams he is entitled to relief because: (1) insufficient evidence was adduced at trial to support his conviction; (2) he had insufficient notice of his charges since he was charged with "open murder" in an information which did not properly plead each element of first degree murder; (3) the jury was prejudiced by evidence of sexual misconduct; (4) the trial court failed to properly instruct

the jury[1]; (5) he was denied effective assistance of counsel[2]; (6) he was denied effective assistance of appellate counsel[3]; and (7) cumulative error.

In their motion to dismiss, respondents argue grounds two, four(C), five, six and seven are abusive. Respondents also argue grounds two, three, four (C), five (B-E), six and seven are unexhausted. Slack was ordered to show cause and prejudice to overcome the abusive bar; however he filed a motion for reconsideration which the court will deny.

ABUSE OF THE WRIT

A second petition may be dismissed for abuse of the writ if new grounds are alleged and the failure to allege them in the previous petition was an abuse of the writ. *See Farmer v. McDaniel*, 98 F.3d 1548, 1555 (9th Cir.1996). The previous petition need not have been dismissed on the merits. *See id.* at 1557. The instant petition therefore may be subject to dismissal for abuse of the writ.

In *McCleskey v. Zant*, 499 U.S. 467 (1991), the U.S. Supreme Court defined the respective burdens of pleading abuse of the writ. The State met that burden here by noting Slack's previous writ history, identifying the grounds for relief that appear for the first time in the instant petition and alleging that Slack abused the writ. *See id.* The burden now is on Slack to disprove abuse of the writ by showing cause for failing to raise the new grounds for relief earlier and prejudice therefrom. *See id.* Slack does not meet his burden.

---

[1] In ground four, Slack claims: (a) the reasonable doubt instruction was unconstitutional; (b) the premeditation and deliberation instruction was unconstitutional; and the malice aforethought instruction was unconstitutional.

[2] In ground five, Slack contends his trial counsel was ineffective when he: (a) failed to prevent the introduction of highly prejudicial evidence; (b) failed to object to reasonable doubt jury instruction; (c) failed to object to premeditation and deliberation jury instruction; (d) failed to object to malice aforethought jury instruction; and (e) failed to investigate the facts of case and develop available defenses.

[3] In ground six, Slack argues he was denied effective assistance of appellate counsel when: (a) appellate counsel failed to raise on direct appeal that Slack was denied his right the due process under the Fifth and Fourteenth Amendment when charged with open murder in an information which did not properly plead elements of first degree murder and that the malice aforethought instruction was unconstitutional; and (b) appellate counsel conceded two of the four issues raised on direct appeal.

In reply to the court order instructing Slack to file points and authorities showing cause and prejudice to overcome the abuse of the writ bar, he filed a motion for reconsideration (#73). First the Court notes that Slack has incorrectly filed his motion for reconsideration pursuant to Fed.R.Civ.P.59. Under this rule a party may move for a new trial or an amendment of a judgment. Since there has not been a trial and a judgment has not been entered in this case, Slack cannot bring a motion pursuant to this rule. Additionally even if Slack could bring a motion under Fed.R.Civ.P.59, the motion must be brought within ten days after the entry of judgment. *See* Fed.R.Civ.P. 59(e). Slack's motion was untimely since it was filed two days after the ten day period expired. Nevertheless, the Court will address Slack's arguments in his motion for reconsideration.

In his motion for reconsideration, Slack claims the State has not established the habeas petition is abusive, the amended petition is not successive, and that the case is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA). As previously noted, the State has met its burden under *McClesky* by specifying which grounds for relief in the amended habeas petition are abusive. Next, the instant petition is Slack's second petition and thus successive. The Ninth Circuit has held that a judge may find a second petition is abusive when new grounds are alleged and a petitioner failed to allege them in the previous petition, even if the previous petition was dismissed for failing to exhaust state remedies. *See Farmer*, 98 F.3d at 1557. Lastly, Slack wrongly asserts the case is governed by the AEDPA because it was commenced after April 26, 1996. First, the instant case was commenced March 27, 1995. Second, the amendments to 28 U.S.C. §§ 2244(a) and 2255 resulting from the AEDPA are not retroactive. *See Lindh v. Murphy*, --- U.S. ----, ----, 117 S.Ct. 2059, 2063 (1997). Accordingly, the AEDPA is not applicable to this case.

Thus, since Slack has failed to demonstrate cause and prejudice to overcome the abuse of the writ bar, the Court will dismiss grounds two, four(c), five, six and seven as abusive.

EXHAUSTION

Although respondents argue several grounds are unexhausted, the court will only address ground three since all other grounds will be dismissed as abusive. Title 28 U.S.C. § 2254 (b) and (c) provide that a state prisoner must exhaust all available state court remedies before filing a petition for habeas corpus in federal court. The exhaustion of available state judicial remedies is ordinarily a prerequisite to obtaining federal habeas corpus relief. 28 U.S.C. § 2254(b) (1988); *Rose v. Lundy*, 455 U.S. 509, 515 (1982). To demonstrate compliance with the exhaustion requirement, a habeas applicant must show that the claim included in the federal petition was "fairly presented" to the state's highest court, *Picard v. Connor*, 404 U.S. 270, 275 (1971), or demonstrate that no state remedy remains available. *Harmon v. Ryan*, 959 F.2d 1457, 1460 (9th Cir. 1992). A claim has been "fairly presented" to the state court if the petitioner has described the operative facts and the legal theory upon which he bases his constitutional claim. *Anderson v. Harless*, 459 U.S. 4, 6 (1982). Furthermore, a petitioner cannot merely allege exhaustion; the record must show that the petitioner sought review in the highest state court. *Cartwright v. Cupp*, 650 F.2d 1103, 1104 (9th Cir. 1981) (per curiam), *cert. denied*, 455 U.S. 1023 (1982). In addition, the habeas petitioner must exhaust his state remedies as to each of his federal claims. If a habeas corpus petition contains both exhausted and non-exhausted claims, the petition must be dismissed. *Rose*, 455 U.S. at 520.

In ground three, Slack claims his Fourteenth and Fifth Amendment right to due process was violated when the jury was prejudiced by evidence of sexual misconduct. Respondents contend the claim is unexhausted because although Slack presented the facts of this claim to the Nevada Supreme Court, he did not claim his Fourteenth and Fifth Amendment rights were violated. If a petitioner fails to alert the state court to the fact that he is raising a federal constitutional claim, his federal claim is unexhausted regardless of its similarity to the issues raised in state court. *Duncan v. Henry*, 513 U.S. 364, 366 (1995); *Johnson v. Zenon*, 88 F.3d 828, 830 (1996); *see also Ybarra v. Sumner*, 678

F.Supp. 1480, 1481 (D.Nev. 1988) (citing *Picard*, 404 U.S. at 276). In his opening brief to the Nevada Supreme Court on direct appeal, Slack never argued his Fifth or Fourteenth Amendment right to due process was violated when prejudicial evidence was presented to the jury. In his opening brief, Slack relied only upon state law to support his claim. *See* #16, ex.20, pp. 15-18. Thus, the Court finds ground three is unexhausted.

CONCLUSION

Since ground three of Slack's third amended habeas petition is unexhausted, this action will be dismissed to allow Slack the opportunity to present the unexhausted claim to the state court. If Slack wishes to continue with this proceeding instead of returning to state court, he will need to re-open this proceeding and abandon the unexhausted claim as described below. *See Reutter v. Crande*, 109 F.3d 575 (9th Cir. 1997). Alternatively, Slack may immediately commence a new federal action in which this court could review the merits of the unexhausted claim because the new action would be subject to the statutory changes effected by the Antiterrorism and Effective Death Penalty Act (AEDPA)[4]; however, relief could not be granted based on any unexhausted claim.

Pursuant to the AEDPA, the dismissal of this action will trigger the commencement of the one year statute of limitations period for Slack to return to federal court with a new action. 28 U.S.C. § 2244(d)(1). The time during which Slack's post conviction proceeding is pending in state court will not count toward the one year period. 28 U.S.C. § 2244(d)(2). Therefore, if Slack waits three months after this dismissal to file a state post conviction petition, he will have only nine months from the disposition of that state proceeding in which to commence a new federal proceeding. The failure to timely commence a new federal proceeding will bar Slack from having the validity of his conviction and/or sentence reviewed in federal court.

---

[4] Until recently, a federal court could not proceed with a mixed petition that contained both exhausted and unexhausted claims for habeas corpus relief. *Rose*, 455 U.S. at 521-22; *Szeto v. Rusen*, 709 F.2d 1340, 1341 (9th Cir. 1983). However, in April 1996, Congress amended 28 U.S.C. § 2254 to give federal courts the authority to deny habeas relief based on unexhausted grounds. Thus, now a federal court can address a mixed petition, but can only deny relief regarding any unexhausted grounds.

IT IS THEREFORE **ORDERED** that Slack's motion for reconsideration (#73) is **DENIED**.

IT IS FURTHER **ORDERED** that grounds two, four(C), five, six and seven are **DISMISSED** with prejudice as abusive.

IT IS FURTHER **ORDERED** that respondents' motion to dismiss (#67) is **GRANTED**, and this action is **DISMISSED** without prejudice. If Slack wishes to abandon the unexhausted claim and proceed with this action, he should file a motion to vacate the judgment and a declaration of abandonment, signed by petitioner, of the above identified ground within thirty (30) days. The Clerk shall enter judgment accordingly.

Dated this 30th day of March, 1998

UNITED STATES DISTRICT JUDGE

District	Off.	Docket No. Yr.	Number	Filing Date Mo.	Day	Yr.	J	Nature Suit	B 23	Judge
0978	3	95	00194	03	27	95	3	530		7811

CLOSED

95 00194DWH

CAUSE: 28 U.S.C. 2254 - HABEAS CORPUS

000190

~~PLAINTIFF~~

SLACK, ANTONIO TONTON

~~DEFENDANT~~

MCDANIEL, E.K.;
ATTORNEY GENERAL OF THE STATE OF NEVADA, Frankie Sue Del Papa

FIRST AMENDED PETITION, fld 10/8/96 #31
SECOND AMENDED PETN/HC - 6/10/97 - #51
THIRD AMENDED PETN/HC - 12/24/97 - #64

APPEAL FLD 4/29/98 (#76)
C/A# _____

EXEMPT FRCP 16(b)

ATTORNEYS

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UNITED STATES DISTRICT COURT DOCKET

DC 111S (Rev. 7/85)

000191

DATE	NR	PROCEEDINGS — Antonio T. Slack vs. Director, NDOP, et.al. — CV-N-95-194-DWH
/27/95	1	MOTION/IFP. olr
--	--	JS-5 (AT). olr
/12/95	2	ORDER(DWH): ORD Petnrs mtn/IFP is GRANTED on temp basis. Clk/crt shl send petnr IFP form/instructs. Petnr shl hv 45 dys to file corr mtn. Failr wil rslt in dismsl ths actn. FUR ORD petn shl be RETAINED but not filed/srvd untl petnrs fin stat is det fur. EOD 4/13/95 (AT). Cps dist. olr
/8/95	3	MOTION to procd IFP obo P. (AT) blg. (2)
/10/95	--	SUB to DWH/rlo: Item #3. (AT) blg.
/30/95	4	PETITION for a writ of H/C obo P.
--	5	ORDER: (DWH) ORD tht the mtn for lv to procd IFP is granted. (furth specs in Ord.) FUR ORD tht Clerk of Crt shl file the petn for a writ of H/C & srv R(s) by cert/mail but the R(s), who shl answ sd petn as directed in the ord being issd herewith. EOD/Cps. dist. 6/8/95 (AT) bm.
--	6	ORDER: (DWH) ORD P shl hv 20 dys frm the dte this ord is ent in wh to inform the crt of any & all adtnl clms for H/C rlf of wh P is aware. (furth specs in Ord.) FUR ORD tht if P files a stmnt of addtnl clms, R(s) shl hv 20 dys frm the dte the stmnt is fld w/in wh to answ, or otherw plead to, the petn & the stmnt of addtl clms. (furth specs in Ord.) EOD/Cps. dist. 6/8/95. (AT) bm.
5/16/95	7	MINUTE ORDER (DWH): ORD P's ltr rec'vd 6/1/95 shl be filed; in as much as it is a reqst to consolidat this actn w/prior actn (CV-N-91-561-HDM), it is denied (cps dist)(AT).csd (EOD 6/23/95)
6/26/95	8	MOTION for appt of cnsl obo P. (AT) (m) mlc 10/12 (13)
7/5/95	9	MOTION/ORDER (DWH): ORD P shl hv enlrgmnt of time to 7/31/95 to file his statmnt of addt'l clms (cps dist)(AT).csd
7/10/95	10	OPPOSITION to mtn for appt of cnsl (8) obo Respndts. (m) (AT) mlc
7/12/95	11	STATEMENT of add'l claims obo petnr (6,9). (m) (AT) mlc
7/19/95	12	REPLY in supprt of P's mtn for appointmnt of cnsl (#8) obo P (m)(AT).csd
7/21/95	--	SUBD TO DWH: #8,#10,#12. csd
8/7/95	--	sub to DWH: item # 6, 11. (AT)
1/8/95	13	MOTION/ORDER (DWH): ORD Rs grntd enlrgmnt of time to 9/15/95 to file/srv respons to P's petn for writ of H/C (#4) (cps dist)(AT).csd
8/23/95	14	MINUTE/ORDER: (DWH) ORD Ps mtn (#8) for apt of cnsl stayed & sh be resub by Clk along w/resp to petitn wh the latter is ripe for decisn. Cps.Dist. (AT) blg. *mld-8/29/95.

CONT'D TO PG. 2

PLAINTIFF	DEFENDANT	CV-N-95-194-DWH DOCKET NO
ANTONIO T. SLACK	DIRECTOR, NDOP, ET. AL.	PAGE 2 OF ___ PAGES

DATE	NR.	PROCEEDINGS
9/15/95	15	MOTION to dism petn for writ of H/C obo Rs (m)(AT).csd 16,21 (27)
---	16	INDEX OF EXHIBITS in supprt of Rs' mtn to dism petn for writ of H/C (#15) obo Rs (m)(AT).csd **(located in separate folder due to size)**
---	17	LETTER addr to clk/ct frm P re stat of case (AT).csd
~~9/18/95~~	--	~~SUBD TO DWH: #17. csd~~
9/25/95	--	SUB TO DWH: Item #15, 16. (AT) bm + #18, 20, 22.
2/29/96	18	ORDER (DWH): ORD tht P shl hv 20 dys frm date of this order w/in which to file pts & auth in oppo to mtn to dism (#15). Rs shl hv 10 dys to file reply. If P fails to resp to this order, mtn will be granted. FUR ORD tht Ps mtn for apptmt of cnsl (#8) is denied. (See order for fur specs) (EOD/cps dist 3/4/96) (AT) rd
3/27/96	--	SUB TO DWH: Item #6, 11, 15, 16. (AT) bm
4/8/96	19	MOTION for enlrgmnt of tm obo P (m)(AT).rm
---	20	MINUTE ORDER (DWH): ORD P shl hv to 4/19/96 to file oppo to mtn to dism (#15); flr to file oppo by tht dt shl be deemed consent to granting of mtn (cps dist)(AT).rm
---	21	OPPOSITION to mtn to dismiss (#15) obo P. (m)(AT).rm
4/17/96	22	REPLY in supprt of mtn to dism petn for writ of H/C (#15) obo Rs. (m) (AT) bm
4/23/96	--	SUB TO DWH: Item #15, 16, 21, 22. (AT) bm
04/24/96	23	MOTION for deflt obo P. (m) (AT) lg (26)
04/25/96	24	RESPONSE to mtn for ruling of deflt **(#23)** obo Rs (m) (AT) lg
5/8/96	25	REPLY to rsponse to mtn for deflt (#23) obo P. bm.
5/9/96	--	SUB TO DWH: Item #23, 24, 25. (AT) bm
05/15/96	26	MINUTE/ORDER: (DWH) ORD Ps mtn for deflt **(#23)** denied. Rs not requrd to file ans until mtn to dism **(#15)** decided. CpsDist. (AT) lg *mld-05/16/96
8/13/96	27	**MEMORANDUM/DECISION/ORDER**: (DWH) ORD Rs' mtn to dism (#15) is granted to the extent tht P shl hv 30 dys in wh to file an am petn clarifying the grnds discussed herein. The Clrk shl prov P w/a cpy of the Crt's petn for writ of H/C form & insts thereto. EOD/Cps. dist. 8/16/96 (AT) bm
8/26/96	28	MOTION for enlrgmnt of tm til 9/13/96 in wh to file & srv his am petn for writ of H/C obo P. (m) (AT) bm (29)
8/27/96	--	SUB TO DWH: Item #28. (AT) bm

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PLAINTIFF	DEFENDANT	CV-N-95-194-DWH DOCKET NO
ANTONIO T. SLACK	DIRECTOR, NDOP, et al.,	PAGE 3 OF ___ PAGES

DATE	NR.	PROCEEDINGS
8/29/96	29	MINUTE ORDER: (DWH) ORD P has moved (#28) for an enlgmnt of tm in wh to comply with the Crt's pr ord (#27). P's mtn (#28) is granted to the extent tht he will hv to & incldng **10/21/96** in wh to file an am petn. Cps. dist. 8/30/96 (AT) bm
10/8/96	30	APPLICATION to procd IFP obo P. bm (32 moot)
--	31	**FIRST AMENDED PETITION for a Writ of H/C obo P.**
11/22/96	--	SUB TO DWH: Item #30, 31. (AT) bm
11/25/96	32	MINUTE/ORDER: (DWH) ORD app to proced IFP **(#30) denied,moot**, IFP grantd @ #5. CpsDst (AT) lg. *mld-12/02/96
12/02/96	--	SUB TO DWH/RLO: Item #31. (AT) lg
12/5/96	33	MINUTE ORDER: (DWH) ORD tht the Clrk shl send to R(s) a cpy of P's am petn for writ of H/C #31. Rs shl hv 30 dys in wh to answ or rspond. EOD/Cps. dist. 12/6/96 (AT) bm
12/27/96	34	NOTICE tht Deputy AG Julie A. Slabaugh has assuemd responsib for rep the int of the named R(s) obo Rs. (m) (AT) bm
12/31/96	35	MOTION for appnt of cnsl obo P. (m) (AT) 37,43
1/6/97	36	MOTION for enlrgmnt of tm til 2/21/97, in wh to file & srv rsponse to P's am petn for writ of H/C obo Rs. (m) (AT) (39)
1/8/97	--	SUB TO DWH: Item #36. (AT) bm
1/10/97	37	OPPOSITION to mtn for appnt of cnsl (#35) obo Rs. (m) (AT) bm
--	38	MOTION for jdgmnt on the pleadings obo P. (m) (AT) bm 41,43
1/13/97	39	MINUTE ORDER: (DWH) ORD Rs' mtn for enlrgmnt of tm (#36) is granted. Rs shl hv to & incldng 2/21/97, in wh to file & srv their rsponse to P's am petn. Cps. dist. 1/14/97 (AT) bm
1/21/97	40	OPPOSITION to mtn for enlrgmnt of tm (#36) obo P. [Moot per #39]
--	41	OPPOSITION to mtn for jdgmnt on the pleadings (#38) obo Rs. (m) (AT)
02/05/97	--	SUB TO DWH: Item #35 (AT) mlc

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CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	CV-N-95-194-DWH DOCKET NO
SLACK	NDOP et al	PAGE 4 OF ___ PAGES

DATE	NR.	PROCEEDINGS
02/10/97	42	MOTION for exttime (until 3/7/97) to resp to amd petn H/C obo respondts (31). (m) (AT) mlc (43)
02/11/97	--	SUB TO DWH: Item #42 (AT) mlc
02/13/97	43	ORDER appointing counsel (DWH) ORD petn's mtn for appt of cnsl (35) to the extent the FPD for the District of NV is appt to represent petnr; Clk shall send a copy of the petn H/C (31) to the FPD; cnsl for petnr shall file an amd petn H/C within 45 days or a ntc to the crt indicating his/her intent to proceed with the current amd petn (31); respondnts' mtn for exttime (42) is denied as moot; petnr's mtn for jgm on the pldgs (38) is denied. (copies dist) (AT) mlc EOD 2/14/97
02/13/97	44	MOTION to strike first amd petn (31) .. and .. MOTION to file an second amd petn H/C obo petnr. (m) (AT) mlc (45) (48)
02/14/97	45	OPPOSITION to mtn to strike first amd petn and mtn to file a second amd petn (44) obo respondts. (m) (AT) mlc
02/24/97	46	NOTICE of representation of petnr (Deborah Trevino, Esq.) (m) (AT) mlc
03/11/97	--	SUB TO DWH: Items 43,44 (AT) mlc
03/12/97	--	LETTER from petnr re: order #43 appt of cnsl. mlc
03/28/97	47	UNOPPOSED MOTION for exttime for petnr to file an amd petn obo petnr. (m) (AT) mlc (48)
03/28/97	--	SUB TO DWH: Item #47 (AT) mlc
04/01/97	48	MINUTE ORDER (DWH) ORD petnr's unopposed mtn for exttime (47) is granted; petnr shall have until 5/30/97 to file the amd petn; petnr's mtn to strike (44) is denied as moot (see #43); Clk shall make a copy of the letter rec'd 3/12/97 from petnr and send a copy to cnsl for petnr. (copies dist) (AT) mlc EOD 4/2/97
05/27/97	49	UNOPPOSED MOTION for exttime to file amd petn H/C (until 6/10) obo petnr. (m) (AT) mlc (50)
05/28/97	--	SUB TO DWH: Item #49 (AT) mlc
05/29/97	50	MINUTE ORDER (DWH) Petnr's unopposed mtn for exttime (49) is granted; petnr shall have until 6/10/97 to file an amd petn. (copies dist) (AT) mlc EOD 5/29/97

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CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO
SLACK	DIRECTOR, NDOP et al	PAGE 5 OF ___ PAGES

DATE	NR.	PROCEEDINGS
06/10/97	51	SECOND AMENDED PETN/HC obo petnr. (50) (m) (AT) mlc
06/11/97	--	SUB TO DWH: Item #51 (AT) mlc
06/13/97	52	INDEX of exhibits in support of first amd petn writ H/C (31) obo petnr. (m) (AT) mlc
06/16/97	53	MINUTE ORDER (DWH) ORD respondnts shall have 30 days to ans/resp to the second amd petn (51). (copies dist) (AT) mlc EOD 6/17/97
07/03/97	54	MOTION for more definite stmt obo respondnts. (m) (AT) mlc (56)(57)(58)(60) (61) (63)
07/21/97	55	CLIENT verification of amd petn H/C (51) obo petnr. (m) mlc
07/21/97	56	UNOPPOSED MOTION for exttime to file an answer to mtn for more definite stmt (54) obo petnr. (m) (AT) mlc (until 8/4) (57)
07/23/97	--	SUB TO DWH:Item #56 (AT) mlc
07/24/97	57	MINUTE ORDER (DWH) ORD petnr's unopposed mtn for exttime (56) is granted; petnr shall have until 8/4/97 to respond to the mtn for more definite stmt (54) (copies dist) (AT) mlc EOD 7/24/97
08/04/97	58	UNOPPOSED MOTION for exttime to file answer to mtn for more definite stmt (54) obo petnr. (m) (AT) mlc (59)
08/04/97	--	SUB TO DWH: Item #58 (AT) mlc
08/07/97	59	MINUTE ORDER (DWH) ORD petnr's unopposed mtn for exttime (58) to file a resp to the mtn for more definite stmt (54) is granted; petnr shall have until 8/18/97 to file his resp. (copies dist) (AT) mlc EOD 8/7/97
08/18/97	60	RESPONSE to mtn for more definite stmt . . . and . . . REQUEST to file fourth amd petn obo petnr. (m)(AT) mlc (54) (61)(63) (Attachment struck/returend #63)
08/28/97	61	REPLY to response to mtn for more definite stmt and request to file fourth amd petn (54,60) obo respondnts. (m) (AT) mlc
08/29/97	--	SUB TO DWH: Item #54,60 (AT) mlc

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CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO.
SLACK	DIRECTOR, NDOP	PAGE 6 OF ___ PAGES

DATE	NR.	PROCEEDINGS
09/26/97	62	NOTICE of addr change obo respondents. (m) mlc
12/03/97	63	MINUTE ORDER (DWH) ORD respondts' mtn for more definite stmt (54) is granted; petnr shall have 20 days to file an amd petn; ORD petnr's mtn for leave to file a fourth amd petn (60) is denied; Clk shall strike the attached petn and return it to petnr's cnsl. (copies dist) (AT) mlc EOD 12/4/97
12/24/97	64	THIRD ~~SECOND~~ AMENDED PETITION obo P. (m) (AT) blg.
--	65	ADDITIONAL/RESPONSE to renewed mtn for more definite stmnt (#54) REQUEST for lv to file 2nd am petn (#64) obo P. (m) (AT) blg. (66)
12/31/97	--	SUB to DWH: Item #64, & 65. (AT) blg.
01/15/98	66	MINUTE ORDER (DWH) petnr has filed a mtn for leave to file a Third Amd Petn (65,64) which is erroneously titled second amd petn; the mtn for leave (65) is granted; ORD petnr's mtn for leave (65) is granted; respondents shall have 30 days to file an ans/response to the third amd petn. (64). (copies dist) (AT) mlc EOD 1/15/98
01/29/98	67	MOTION to dismiss third amd petn/HC (64) obo respondnts. (m) (AT) mlc (68,69) (70)(71) (74,75)
02/17/98	68	MOTION for exttime (2/24/98) to file resp/oppo to mtn to dismiss (67) obo petnr. (m) (AT) mlc
02/18/98	--	SUB TO DWH: Item #68 (AT) mlc
02/19/98	69	MINUTE ORDER (DWH) ORD petnr's mtn for exttime (68) is granted; petnr shall have until 2/24/98 to file a resp/oppo to mtn to dismiss. (67) (copies dist) (AT) mlc EOD 2/19/98
02/24/98	70	OPPOSITION to mtn to dismiss petn writ H/C (67) obo petnr. (m) (AT)mlc
03/06/98	71	REPLY to oppo to mtn to dismiss petn writ H/C (67,70) obo respondents. (m) (AT) mlc
03/10/98	72	MEMORANDUM/DECISION/ORDER (DWH) ORD petnr shall have 15 days to file points and authorities addressing whether he can overcome the abuse of the writ bar that is applicable to grounds two, four(C),five,six, and seven of the petn H/C (64); no exttimes will be granted. (copies dist) (AT) mlc EOD 3/11/98
3/26/98	73	MOTION for reconsdrtn of memo decisn & ord (#72) obo P. (m) (AT) blg. (74,75)

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CIVIL DOCKET CONTINUATION SHEET

CV-N-95-194-DWH

PLAINTIFF	DEFENDANT	DOCKET NO.
SLACK	DIRECTOR, NDOP et al	PAGE 7 OF ___ PAGES

DATE	NR.	PROCEEDINGS
03/30/98	--	SUB TO DWH: Item #67,73 (AT) mlc
03/30/98	74	MEMORANDUM/DECISION/ORDER (DWH) ORD petnr's mtn for reconsid (73) is denied; Grounds two, four (C), five, six, and seven are dismissed with prej as abusive; respondents' mtn to dismiss (67) is granted and this actn is dism without prej; should petnr wish to abandon the unexhausted claim and proceed with this actn; he should file a mtn to vacate the jgm and a declaration of abondonment, of the above identified ground within 30 days; Clk shall enter jgm. (copies dist) (AT) mlc EOD 3/31/98
03/31/98	75	JUDGMENT (LSW/mlc) ORD respondents' mtn to dismiss (67) is granted and this actn is dismissed without prej. (copies dist) (AT) mlc EOD 3/31/98
	--	JS-6 (AT) mlc
04/29/98	76	NOTICE OF APPEAL of order/jgm of 3/30/98 and 3/31/98 (74,75) obo petnr. (m) (AT) mlc
04/29/98	--	SUB TO DWH: Item #76 (for COA order).(AT) mlc
5/11/98	77	APPLICATION for Certificate of Probable Cause obo P. (m) (AT) blg. (78)
5/12/98	--	SUB to DWH: Item #77. (AT) blg.
05/12/98	78	ORDER (DWH) ORD the cert of probable cause is denied. (copies dist) (AT) mlc EOD 5/19/98
05/18/98	79	TRANSMITTAL LETTER/CERTIFICATE OF RECORD sent to USCA forwarding certified copies of ntc of appeal, order/jgm, and order denying CPC with docket entries. (copies dist) (AT) mlc EOD 5/19/98
	--	COMPLETE file sent to USCA. mlc

Robert Jeffrey FARMER,
Petitioner–Appellee,

v.

E.K. McDANIEL;* Attorney General of the State of Nevada, Respondents–Appellants.

No. 95–99016.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 18, 1996.

Decided Oct. 29, 1996.

After defendant's first-degree murder conviction was upheld on direct appeal, 101 Nev. 419, 705 P.2d 149, defendant petitioned for habeas relief. The United States District Court for the District of Nevada, Lloyd D. George, Chief Judge, dismissed petition without prejudice, and state appealed. The Court of Appeals, Rymer, Circuit Judge, held that: (1) state had standing to appeal, and (2) amended third habeas corpus petition filed by state prisoner could be dismissed for abuse of the writ even though prior petitions were dismissed for failure to exhaust and were thus not reviewed on the merits.

Reversed; vacated and remanded.

Schroeder, Circuit Judge, filed opinion concurring in part and dissenting in part.

1. **Habeas Corpus ⇐815**

State had standing to appeal from order dismissing amended third habeas petition without prejudice; as practical matter, dismissal of petition put end to action in district court and state did not gain dismissal with prejudice of claims asserted for abuse of writ, although state prevailed to extent that petitioner was required to exhaust claims that state contended were unexhausted.

2. **Habeas Corpus ⇐898(1)**

When state alleges that grounds for habeas relief alleged in second or subsequent petition are "new and different" under rule governing dismissal of successive petitions, abuse of writ analysis is not foreclosed as matter of law solely because prior petitions have not been reviewed on merits; rather, this should simply be important factor that informs district court's discretion in applying abuse of the writ doctrine. Rules Governing § 2254 Cases, Rule 9(b), 28 U.S.C.A. foll. § 2254.

3. **Habeas Corpus ⇐814**

Order dismissing third amended habeas corpus petition without prejudice for petitioner's failure to exhaust state avenues of relief was final order that could be appealed by state.

4. **Habeas Corpus ⇐899**

Order dismissing third amended habeas petition without prejudice, to permit petitioner to exhaust state remedies, did not dismiss only the petition, where by its terms, order and judgment dismissed action, and each of petitioner's three federal habeas petitions launched new action, with new number.

5. **Habeas Corpus ⇐898(1)**

Presentation of unexhausted claims in amended third habeas petition did not require dismissal of entire petition as abuse of writ. Rules Governing § 2254 Cases, Rule 9, 28 U.S.C.A. foll. § 2254.

6. **Habeas Corpus ⇐898(1)**

Habeas corpus rule governing dismissal of successive petitions permits district courts to dismiss second or successive petition if new and different grounds are alleged and judge finds failure of petitioner to assert those grounds in prior petition, whether or not result on the merits, was abusive. Rules Governing § 2254 Cases, Rule 9(b), 28 U.S.C.A. foll. § 2254.

7. **Habeas Corpus ⇐898(1)**

Amended third habeas corpus petition filed by state prisoner could be dismissed for abuse of the writ even though prior petitions were dismissed for failure to exhaust and were thus not reviewed on the merits; district court was not precluded as matter of law from considering whether petitioner's conduct in failing to allege grounds in prior petitions that he alleged third time around was abusive solely because his prior petitions were not reviewed on the merits. Rules Governing § 2254 Cases, Rule 9(b), 28 U.S.C.A. foll. § 2254.

8. **Habeas Corpus ⇐898(1)**

District court is not precluded as matter of law from considering whether habeas petitioner has abused the writ by alleging in subsequent federal habeas petition new and different grounds from those alleged in prior habeas petition, whether or not that prior petition was determined on the merits. Rules Governing § 2254 Cases, Rule 9(b), 28 U.S.C.A. foll. § 2254.

9. **Habeas Corpus ⇐898(1)**

Claims that were presented in state prisoner's initial and second federal habeas petitions but were not determined on the merits because they were unexhausted were outside scope of rule governing dismissal of successive petitions for abuse of the writ. Rules Governing § 2254 Cases, Rule 9(b), 28 U.S.C.A. foll. § 2254.

Robert E. Wieland, Deputy Attorney General, Carson City, NV, for respondents-appellants.

Michael Pescetta, Assistant Federal Public Defender, Las Vegas, NV, for petitioner-appellee.

Appeal from the United States District Court for the District of Nevada, Lloyd D. George, District Judge, Presiding. D.C. No. CV–S–93–0434–LDG.

Before: SCHROEDER, RYMER and KLEINFELD, Circuit Judges.

RYMER, Circuit Judge:

This appeal requires us to consider a novel, but narrow question: whether an amended third habeas corpus petition by a prisoner in state custody may be subject to dismissal for abuse of the writ even though prior petitions were dismissed for failure to exhaust and thus were not reviewed on the merits.[1] The district court thought not, but the State of Nevada wants the opportunity to argue that Robert Jeffrey Farmer has filed a series of petitions with new, unexhausted claims to avoid (and delay for more than seven years) a review of his sentence and conviction in federal court. It has timely appealed a judgment dismissing Farmer's amended third petition pursuant to *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982).

[1, 2] Although Farmer submits that dismissal of his amended third petition without prejudice is not a final, appealable order, and that the state lacks standing to appeal from an order in its favor, we think otherwise. As a practical matter, dismissal of Farmer's petition put an end to this action in the district court and, despite prevailing to the extent that Farmer is required to exhaust claims that the state contends were unexhausted, Nevada did not get all that it wanted—dismissal with prejudice of claims asserted for abuse of the writ—but instead faces the prospect of further litigation on these claims in a different forum. For this reason the State has standing to appeal from that part of the order that is unfavorable to it. Having jurisdiction, we conclude that when the state alleges that the grounds for relief alleged in a second or subsequent petition are "new and different" under Rule 9(b) of the Federal Habeas Corpus Rules, abuse of the writ analysis is not foreclosed as a matter of law solely because prior petitions have not been reviewed on the merits. Rather, this should simply be an important factor that informs the district court's discretion in applying the abuse of the writ doctrine. We therefore vacate the district court's judgment and re-

* E.K. McDaniel, the current warden of the Nevada State Prison that has custody of Robert Jeffrey Farmer, has been substituted for Ron Angelone, in accordance with Fed.R.Civ.Proc. 25(d)(1), and pursuant to Federal Rule of Appellate Procedure 43(c)(1).

1. We decide this question entirely under the law as it existed prior to enactment of the "Antiterrorism and Effective Death Penalty Act of 1996." Pub.L. No. 104–132, 110 Stat. 1214 (April 24, 1996). Although § 107, to be codified in part at 28 U.S.C. § 2266(c), by its terms makes the Act's Special Habeas Corpus rules applicable to all capital cases pending on the date of enactment (if other conditions are also met), no one has suggested that the conditions are met and that the Act in fact applies to this appeal.

mand for it to consider whether any of the grounds alleged in the amended petition are "new and different" from those grounds alleged in Farmer's second petition and, if so, whether Farmer's failure to assert those grounds in his prior (second) petition was an abuse of the writ.

I

Farmer murdered a man the night of January 18–19, 1982. On March 26, 1984, he pleaded guilty to murder in the first degree and was sentenced to death. The Nevada Supreme Court affirmed his conviction and sentence August 27, 1985, *Farmer v. State of Nevada*, 101 Nev. 419, 705 P.2d 149 (1985), and the United States Supreme Court denied his petition for certiorari, *Farmer v. Nevada*, 476 U.S. 1130, 106 S.Ct. 1999, 90 L.Ed.2d 679 (1986).

On September 16, 1986, Farmer filed a petition for a writ of habeas corpus in the state trial court and a week later, filed his first petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in federal district court. The federal petition, filed with the assistance of counsel, sought a stay of execution, which the district court entered. The petition also, however, alleged different grounds for relief from those being pursued in state court, which prompted the district court to warn Farmer that his failure to assert grounds known to him in his federal petition may bar the assertion of such grounds in a future federal petition as an abuse of the writ.[2] As a result, Farmer moved to dismiss the petition without prejudice. The district court so ordered February 6, 1987, to permit Farmer to exhaust state remedies. Although the court also vacated the stay of execution, it appears that no new date was set while state habeas proceedings were pending.

The Nevada Supreme Court ultimately refused to address the merits of Farmer's claims because they "have been either procedurally barred, or [ ] Farmer has failed to sustain his burden of proof or show prejudice." *Farmer v. Director, Nevada Dept. of Prisons*, 104 Nev. 856, 809 P.2d 603 (1988) (unpublished disposition). The United States Supreme Court denied certiorari February 27, 1989. *Farmer v. Sumner*, 489 U.S. 1060, 109 S.Ct. 1331, 103 L.Ed.2d 599 (1989).

Farmer filed his second federal habeas petition April 7, 1989. The district court stayed Farmer's rescheduled execution date of May 2, 1989; appointed new counsel to represent him in the federal proceedings; and again cautioned Farmer that if he "fails to include all possible grounds for relief, he may later be precluded from raising the previously omitted grounds because the omission may be considered an abuse of the writ" under Rule 9(b). On July 13, 1989, Farmer moved to dismiss his second petition without prejudice because "he has claims to raise which have not heretofore been raised in state court, and therefore could not raise in this petition due to the exhaustion of state remedies requirement." Nevada opposed dismissal on the ground that the claims Farmer wanted to exhaust in the state court either were not legitimate constitutional claims or were procedurally barred. Meanwhile, Farmer asked the court to hold the federal proceeding in abeyance rather than dismiss it, in the event the state court refused to issue a stay. However, the court again dismissed Farmer's petition without prejudice under *Rose v. Lundy*,[3] and dissolved the stay of execution.

Farmer then started a new round of state proceedings, which ended when the Nevada Supreme Court dismissed his appeal from the dismissal of his petition for post-conviction relief. On May 11, 1993, Farmer filed his third federal habeas petition. Nevada moved to dismiss the petition with prejudice as an abuse of the writ under Rule 9(b), and also raised exhaustion and procedural default defenses. The district court denied Nevada's motion to dismiss as premature; rejected Nevada's abuse of the writ defense since Farmer's two prior federal habeas petitions "were dismissed by the court because they included unexhausted claims; they were not dismissed on the merits of those claims"; and, responding to *McCleskey v. Zant*, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991), allowed Farmer six months to amend his third federal petition setting forth "all possible grounds for relief."

Pursuant to this order, Farmer filed his amended third petition for writ of habeas corpus August 15, 1994. He alleged that 10 of its 27 claims had "arguably" been exhausted, but that none had been deliberately withheld or waived. Contending that Rule 9(b) covers situations in which new claims are raised which were not raised in the first petition, and relying on the decision of the United States Supreme Court in *McCleskey*, Nevada moved to dismiss the petition with prejudice on the ground that the court was obliged to conduct an abuse of the writ inquiry in light of Farmer's writ history (which, in the state's view, would show that the amended third petition was filed only to vex, harass and delay, and that the new claims of error could and should have been exhausted in accordance with the court's prior orders) before it reached whatever *Rose v. Lundy* problems continued to lurk in the third amended petition. The state also argued that the unexhausted claims were procedurally barred, and conclusory. As before, Farmer requested dismissal without prejudice so that he could return to state court to exhaust his new and unexhausted claims. Noting that all of the state's other arguments were addressed when its first motion to dismiss was denied, the district court again dismissed pursuant to *Rose v. Lundy*, advising that "this will be the *only* opportunity to return to state court to exhaust any unexhausted grounds."[4]

Nevada filed a timely notice of appeal from the district court's "Order Dismissing Mixed Petition and the Judgment in a Civil Case entered June 27, 1995 as to all issues of law."[5] Farmer moved to dismiss for lack of jurisdiction. We consider this motion first.

II

Farmer challenges our jurisdiction because the district court's disposition is not a final order, and because Nevada is not an aggrieved party inasmuch as dismissal on exhaustion grounds favors the state. He argues that the order and judgment dismissed only the amended petition, not the underlying action, and that even if the state prevailed on its abuse of the writ theory, the result would be the dismissal with prejudice of only some of the claims in the amended

2. The district court's November 4, 1986 minute order states:

> It appears that petitioner is pursuing post-conviction relief in the State court on grounds not addressed in the 2254 petition filed in this Court. The Court notes that if petitioner goes forward in this manner, he may be waiving his right to seek federal habeas relief in the future with regard to those issues which are being pursued in the State court and which are not included in the petition before this Court. The failure of petitioner to assert grounds known to him in a petition may bar the assertion of such grounds in a future petition for habeas corpus in the federal district court as an abuse of the writ. Here petitioner and his counsel are well advised of additional possible habeas grounds which could be asserted before this Court but which are unexhausted and are being pursued in the State court. If petitioner desires to preserve the right to pursue the issues being raised in the State Court in future federal habeas proceedings, he may want to consider the dismissal of this petition without prejudice so that the additional issues may be exhausted.

3. In *Rose v. Lundy*, the Court adopted a total exhaustion rule which, in effect, gives habeas litigants who initially submit a mixed petition of exhausted and unexhausted claims a chance to resubmit a petition with only exhausted claims or to exhaust the remainder of their claims, thereafter presenting the federal court "with a single habeas petition." 455 U.S. at 520, 102 S.Ct. at 1204. The Court cautioned, as the district court did here in its orders dismissing Farmer's first two petitions, that a prisoner who proceeds with exhausted claims and deliberately sets aside unexhausted claims risks dismissal of subsequent federal petitions on abuse of the writ grounds.

4. The order further provided that "[i]f Petitioner learns of additional unexhausted grounds not currently alleged in this action while the state court proceedings are pending *and* is able to exhaust those grounds prior to returning to this Court, then those additional *exhausted* grounds will be allowed to be raised in this court in a subsequent petition." The district judge set time limits, and ordered that a new action be assigned to him rather than by draw.

5. After briefing but before oral argument on Nevada's appeal, Farmer filed a motion to take judicial notice of the subsequent state court proceedings in this case. We deny the motion inasmuch as what has occurred in Nevada state court since the district court dismissed the action and amended third petition is not material to the narrow issue we face on appeal.

petition. As dismissal of some, but not all, claims in a habeas petition is not a final order, Farmer suggests, the order appealed from is not a final decision. Nevada counters that it does seek review of a final order since the district court entered a judgment dismissing the action, the state will lose its right to have this petition decided unless we consider its appeal, and the practical effect of the court's order is to grant Farmer a stay of indeterminate length. Farmer contends that regardless, Nevada lacks standing since the order it seeks to appeal granted its own motion to dismiss.

A

[3] "In a habeas corpus proceeding before a circuit or district judge, the *final order* shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had." 28 U.S.C. § 2253 (emphasis added); *see also Blazak v. Ricketts*, 971 F.2d 1408, 1410 (9th Cir.1992) ("The settled rule in civil proceedings that we have jurisdiction over only final judgments applies to habeas proceedings."). The Supreme Court has instructed that "the finality requirement should be given a practical rather than a technical interpretation." *United States v. Lee*, 786 F.2d 951, 956 (9th Cir.1986) (*citing Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152, 85 S.Ct. 308, 310–11, 13 L.Ed.2d 199 (1964)). A final order is generally one that "ends the litigation and leaves nothing more for the court to do," *id.* (citations omitted), such that, "[u]nless the district court's order is overturned on appeal, nothing is left for the district court but to ensure the execution of its judgment," *Blazak*, 971 F.2d at 1411. Similarly, "an order which effectively sends a party out of court is appealable," *Lee*, 786 F.2d at 956; *see also Herrington v. County of Sonoma*, 706 F.2d 938, 939 (9th Cir.1983) (same), and "[a] decision is final for purposes of appeal if an appeal is the only method of obtaining review," *Lee*, 786 F.2d at 956.

[4] We do not agree with Farmer's argument that the district court dismissed only the petition. In terms, its order and judgment dismissed the action, and each of Farmer's three federal habeas petitions launched a new action, with a new number. *Proud v. United States*, 704 F.2d 1099, 1100 (9th Cir. 1983) (per curiam), upon which Farmer relies, is inapposite because the district court in *Proud* dismissed the complaint but not the action.

Regardless, Farmer contends, an order dismissing a complaint without prejudice is not final because it contemplates a new or amended filing. However, a dismissal "without prejudice" can be just as final as one "with prejudice" if it is "intended to end the litigation in the court involved but not to act as an adjudication on the merits or to bar the filing of a similar action in another court." *McGuckin v. Smith*, 974 F.2d 1050, 1053 (9th Cir.1992). Examples of such orders abound, including analogous dismissals for failure to exhaust administrative remedies, *see United States v. Orr Water Ditch Co.*, 914 F.2d 1302, 1306–07 (9th Cir.1990), and for failure to exhaust the grievance procedures under a collective bargaining agreement, *see Ramirez v. Fox Television Station, Inc.*, 998 F.2d 743, 746–47 (9th Cir.1993). Dismissal of Farmer's amended third petition for failure to exhaust effectively terminated the litigation in district court, sending the parties out of the federal system. *See Quackenbush v. Allstate Insurance Co.*, — U.S. —, —, 116 S.Ct. 1712, 1716, 135 L.Ed.2d 1 (1996) (order remanding on abstention grounds is appealable as a final order because "it puts the litigants in this case effectively out of [federal] court"). This leaves nothing for the district court to do unless and until Farmer exhausts state court remedies and files a new action in federal court.

Nor do we believe that finality of the district court's order in this case can hinge on what might have happened if the court had considered the state's motion to dismiss for abuse of the writ, dismissing some but not all of the claims, and whether *that* order would be final. Farmer's reliance on *Bermudez v. Smith*, 797 F.2d 108 (2d Cir.1986), where the district court ordered dismissal of only four of seven claims alleged in the prisoner's habeas petition and the Second Circuit held that such an order of partial dismissal wasn't final, is misplaced because here the district court dismissed Farmer's entire petition. It is dismissal of the entire petition that is the final order, not the court's ruling (one way or the other) on the abuse of the writ issue.

Farmer finally contends that even though an order dismissing a petition as a "mixed" petition is a final order for jurisdictional purposes when it is the *prisoner* who is appealing, *see, e.g., Weaver v. Foltz*, 888 F.2d 1097 (6th Cir.1989) (reversing district court order dismissing a mixed petition, and directing the court on remand to address the merits of the exhausted claims); *Wise v. Fulcomer*, 958 F.2d 30 (3rd Cir.1992) (vacating district court order dismissing habeas petition for failure to exhaust state remedies, and directing the court on remand to decide whether the petition constitutes an abuse of the writ); *see also* 2 James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* § 35.1, at 1050 (2d ed. 1994) ("[A]n order denying all the claims for relief in the petition or dismissing the petition as a whole ... [is] appealable."), it is final *only* when the prisoner appeals from it. This cannot be. An order is either final or not final, without regard to which party asks the court of appeals to review it. Our decision in *Confederated Salish v. Simonich*, 29 F.3d 1398 (9th Cir.1994), on which Farmer relies, does not suggest otherwise. We held in *Simonich* that an order denying a motion to dismiss under the abstention doctrine of *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), was not a final order. *Simonich* thus turns on the unremarkable rule that some orders are final—such as an "order abstaining under *Younger* and dismissing the case"—while some are not—like a district court's order that it "will *not* abstain under *Younger* and dismiss the case." *Id.* at 1401.[6]

We therefore hold that the district court's order dismissing Farmer's amended third habeas petition for his failure to exhaust state avenues of relief is a final order.[7]

B

Notwithstanding an appealable final order, an appeal may be taken only by those who have standing. Farmer contends that Nevada lacks standing, arguing only that this case parallels *Dolenc v. Love*, 40 F.3d 656 (3d Cir.1994). There, the Third Circuit dismissed Pennsylvania's appeal from an order that dismissed Dolenc's fourth habeas petition on exhaustion grounds. Pennsylvania complained on appeal that a renewed abuse of the writ plea to Dolenc's anticipated fifth petition would be barred on grounds of collateral estoppel or law of the case. Noting that Pennsylvania would have standing if it were correct that the district court's ruling would operate as law of the case, the Third Circuit couldn't see why the district court would be precluded from re-examining the issue. *Id.* at 657–58. The posture of this case and the position of the state on this appeal are different, however. Unlike the district court in *Dolenc*, the district court here did not rule on the merits of the state's motion to dismiss for abuse of the writ but rather concluded that it could not reach that issue as a matter of law because it had not previously disposed of Farmer's claims on the merits. Nevada complains on appeal that this ruling prevents it from getting a ruling on the merits of the abuse of the writ issue so long as Farmer continues to file unexhausted or mixed petitions, and prevented it from arguing for a dismissal with prejudice of Farmer's amended third petition. As it will never have another opportunity to have *that* decision reviewed, the state is sufficiently aggrieved by the district court's adverse ruling to have standing to appeal. *See, e.g., Hoover v. Switlik Parachute Co.*, 663 F.2d 964, 966 (9th Cir.1981) (a defendant has standing to appeal from the grant of summary judgment for a codefendant, because in granting summary judgment the district court made a subsidiary ruling adverse to the appealing defendant); *LaBuhn v. Bulkmatic Transp. Co.*, 865 F.2d 119, 121–22 (7th Cir. 1988) ("For a prevailing defendant to appeal is unusual but not impermissible. Obviously,

6. This is not to say, of course, that every party to an action has the right to appeal from every final order. But the determination of *who* can appeal depends on principles of "standing" rather than of finality, which we address in Part IIB.

7. Because we hold that the order is final, we need not consider whether it is immediately appealable as a "collateral" order under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).

you can't appeal from a decision that is *entirely* in your favor.... But you can appeal from the parts of a generally favorable order that are unfavorable to you...."); *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980).

We therefore conclude that we have jurisdiction, and now proceed to the merits.

III

[5] Nevada first argues that presentation of unexhausted claims in the amended third petition constituted an abuse of the writ and that the district court erred by failing to dismiss the petition as a whole as an abuse of the writ. We reject this argument, as it misapprehends the discretion that is reposed in district courts to decide whether there has been an abuse of the writ on a case-by-case basis. *See, e.g., Howard v. Lewis*, 905 F.2d 1318, 1321 (9th Cir.1990) (review of decision to deny consideration of habeas petition on the merits is for abuse of discretion); Habeas Corpus Rule 9, Advisory Committee Notes, at 801 ("bar set up by subdivision (b) [of Rule 9] is not one of rigid application, but rather is within the discretion of the courts on a case-by-case basis"). The state further asks us to require the district court to find that the presentation of unexhausted claims in the amended third petition is an abuse of the writ. This we also will not do. Rather, we consider only the narrow legal question of whether the district court correctly concluded that "although the *McCleskey* case is intolera[nt] of subsequent petitions, it deals with subsequent petitions after the first petition has been dismissed on the merits."

On this point, Nevada contends that Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C.A. foll. § 2254, covers those situations in which new claims are raised which were not raised in the first petition if the judge finds that the failure to assert those grounds in a prior petition constituted an abuse of the writ. While the state does not disagree that Farmer's amended third petition contains unexhausted claims that make it subject to dismissal under *Rose v. Lundy*, it argues that inquiry had to be made into whether the petition constitutes an abuse of the writ or is otherwise subject to dismissal with prejudice as a threshold matter before the district court could dismiss for lack of exhaustion. Nevada maintains that it adequately pled abuse of the writ by noting Farmer's prior writ history, which indicates that all 27 of the claims presented in Farmer's amended third petition appeared for the first time in that petition. From this, it posits that the amended third petition was filed only to vex, harass and delay the final adjudication of Farmer's state court judgment.

Farmer counters that the district court properly refused to dismiss his amended third petition because it is not a "second or successive one" within the meaning of 28 U.S.C. § 2244(b) and Rule 9(b). Instead, he submits, the defense of abuse of the writ arises only when there has been an adjudication of a previous federal petition on the merits.

A

"We look first to the plain language of the statute, construing the provisions of the entire law, including its object and policy, to ascertain the intent of Congress." *Alarcon v. Keller Indus., Inc.*, 27 F.3d 386, 389 (9th Cir.1994) (citations omitted). Rule 9(b) provides:

> **Successive Petitions.** A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

28 U.S.C.A. foll. § 2254, Rule 9(b).[8]

By its terms, Rule 9(b) appears to contemplate two possibilities for dismissal of a second or successive petition: *one*, if the judge finds that it does not allege new or different grounds and the prior determination was on the merits; *the other*, if new and different grounds are alleged and the judge finds that the petitioner's failure to assert them in a prior petition was an abuse of the writ. Only the second clause is at issue here, as there is no contention in this case that the same grounds are alleged in the amended third petition as in any prior petition, or that there has been a prior merits determination on any of those grounds that precludes reexamination in the amended third petition.

Farmer says that Rule 9(b)'s reference to "second or successive petition" incorporates the concept of a prior merits determination into both clauses. But reading the Rule in this way would render the requirement in the first clause that "the prior determination was on the merits" redundant. We have difficulty reading the second clause as if it, too, includes a requirement that the prior petition (which did not include the grounds alleged in the subsequent petition) be a "prior determination on the merits." Literally, dismissal under this prong may occur if only two things are found: (1) new and different grounds are alleged and (2) the failure to assert those grounds in a prior petition constituted an abuse of the writ. Had Congress intended to limit the bases for dismissal of "new and different" grounds other than by what constitutes an abuse of the writ, it could have done so either by making the entire Rule applicable only if "the prior determination was on the merits" or by adding the phrase "determined on the merits" after the words "prior petition." Given how it is actually written, we cannot say that Rule 9(b) itself requires the prior petition that triggers abuse of the writ analysis to be one that was resolved on the merits.

The Advisory Committee Notes to Rule 9(b) indicate that the Rule distinguishes between "same ground" and "new and different" ground petitions on this basis. Habeas Corpus Rule, Advisory Committee Notes, 28 U.S.C.A. foll. § 2254, at 798. As the Notes explain:

> **Subdivision** (b) deals with the problem of successive habeas petitions. It provides that the judge may dismiss a second or successive petition (1) if it fails to allege new or different grounds for relief or (2) if new or different grounds for relief are alleged and the judge finds the failure of the petitioner to assert those grounds in a prior petition is inexcusable.
>
> In *Sanders v. United States*, 373 U.S. 1 [83 S.Ct. 1068, 10 L.Ed.2d 148] (1963), the court, in dealing with the problem of successive applications, stated: [9]
>
> > Controlling weight *may* be given to denial of a prior application for federal habeas corpus or § 2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application. [Emphasis added.]
>
> 373 U.S. at 15 [83 S.Ct. at 1077]
>
> The requirement is that the prior determination of the same ground has been on the merits. This requirement is in 28 U.S.C. § 2244(b) and has been reiterated in many cases since *Sanders*. ...
>
> With reference to a successive application asserting a new ground or one not previously decided on the merits, the court in *Sanders* noted:
>
> > In either case, full consideration of the merits of the new application can be avoided [only] if there has been an abuse of the writ * * * and this the Government has the burden of pleading. * * *
> >
> > Thus, for example, if a prisoner deliberately withholds one of two grounds for

8. Rule 1 provides that the Habeas Corpus Rules are applicable to petitions by persons in custody pursuant to a judgment of a state court. *See* 28 U.S.C. § 2254 Rule 1 ("[t]hese rules govern the procedure in the United States district courts on applications under 28 U.S.C. § 2254 ... by a person in custody pursuant to a judgment of a state court, for a determination that such custody is in violation of the Constitution, laws, or treaties of the United States"). Farmer is such a person.

9. Although *Sanders* was concerned with a motion by a federal prisoner under § 2255, rather than an application for a writ of habeas corpus by a state prisoner, the Court made clear that it was announcing principles that should be applied equally to all successive applications for federal habeas relief. *Sanders*, 373 U.S. at 15, 83 S.Ct. at 1077.

federal collateral relief at the time of filing his first application, * * * he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground.

373 U.S. at 17–18 [83 S.Ct. at 1078]

Subdivision (b) has incorporated this principle and requires that the judge find petitioner's failure to have asserted the new grounds in the prior petition to be inexcusable.

. . . . .

Subdivision (b) is consistent with the important and well established purpose of habeas corpus. It does not eliminate a remedy to which the petitioner is rightfully entitled. However, in *Sanders*, the court pointed out:

> Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.

373 U.S. at 18 [83 S.Ct. at 1078]

Id. at 799–800.

Although Farmer correctly argues that a habeas petitioner may not be deprived of a hearing on the merits of his first federal habeas case for "equitable" reasons not founded in statute, rule and precedent, *Lonchar v. Thomas*, — U.S. —, 116 S.Ct. 1293, 134 L.Ed.2d 440 (1996), he offers no grammatically sensible way that Rule 9(b) can be read to treat the first prong—providing for dismissal for failing to allege "new and different grounds" when the prior determination was on the merits—the same as the second prong—providing for dismissal for alleging "new and different grounds" when failing to do so in a prior petition was abusive. Nor are we persuaded that interpreting Rule 9(b) as the Advisory Committee does would impermissibly conflict with § 2244(b), as Farmer suggests. While § 2244(b) is predicated on an adjudication of the merits,[10] Rule 9(b) was also enacted by Congress, after § 2244(b). 28 U.S.C. § 2244(b) (enacted in 1966); Habeas Corpus Rule 9(b) (promulgated in 1976); *see also Ritchie v. Eberhart*, 11 F.3d 587, 593 n. 3 (6th Cir.1993) ("The abuse of the writ doctrine is codified ... in two enactments of equal status: Rule 9(b) and 28 U.S.C. § 2244(b)."), *cert. denied*, 510 U.S. 1135, 114 S.Ct. 1111, 127 L.Ed.2d 422 (1994). To the extent there is a conflict, the most recently passed statute or rule prevails. *See Boudette v. Barnette*, 923 F.2d 754, 757 (9th Cir.1991) (holding that a federal rule of civil procedure prevails over an earlier passed but conflicting United States Code section because "[w]hen two statutes conflict the general rule is that the statute last in time prevails as the most recent expression of the legislature's will") (citation omitted); *International Union, United Auto., Aerospace & Agr. Implement Workers of America, Local 737 v. Auto Glass Employees Fed. Credit Union*, 72 F.3d 1243, 1247 (6th Cir.1996) (explaining that the basis for the rule that a later passed statute controls is the "settled principle of statutory construction that when Congress drafts a statute, courts presume that it does so with full knowledge of the existing law").[11]

10. Section 2244(b) states in full:

> When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

11. Farmer suggests that interpreting "prior petition" as one not required to have been determined on the merits also conflicts with Rule 22–4(a) of the Ninth Circuit's capital habeas rules. Rule 22–4(a) provides:

> A "first petition" for habeas corpus ... shall mean: the original filing relating to a particular conviction or sentence, and a subsequent or amended filing if the original filing was dismissed on grounds other than on the merits. The term[ ] "first petition" ... shall not include: ... (ii) a petition for habeas corpus that has been dismissed by the district court for lack of jurisdiction.

6] As we read both its text and its histo- therefore, Rule 9(b) permits the district rt to dismiss a second or successive peti- if new and different grounds are alleged l the judge finds the failure of the peti- ier to assert those grounds in a prior ition, whether or not resolved on the mer- was abusive.

B

7] Nevada contends that Farmer has no hority for his position that abuse of the t analysis is inapplicable unless a prior ition has been determined on the merits, relies on *Sanders*, *McCleskey*, and *Bonin Vasquez*, 807 F.Supp. 586 (C.D.Cal.1992), argue that Farmer's second return from e court with unexhausted claims and no austed claims is abusive. However, the e devotes most of its argument to inexable neglect, unreasonable delay, and mer's inability to meet Nevada's cause prejudice standard upon return to state rt. These arguments have nothing to do whether Nevada's motion to dismiss for se of the writ was premature, as the rict court concluded, and we therefore do address them.[12] More to the point, mer argues that *McCleskey* abuse occurs after a federal court addresses the mer- f a previous petition, and that this circuit others, have so held. We disagree.

e see no inconsistency, as the second prong of le 9(b) has to do with alleging new and differt grounds from those alleged in a "prior peti- n" whereas Rule 22–4(a) has to do with assurg that a certificate of probable cause will be ued and a stay of execution will be in place til the death penalty panel issues its mandate the first petition addressed on the merits. othing we hold today affects application of the rcuit's automatic stay rules or implies that a titioner should not have "a single habeas peti- n," *see Rose v. Lundy*, 455 U.S. at 520, 102 Ct. at 1204, heard on the merits in federal urt.

In passing, both Nevada and Farmer remark the fact that, at the time the second federal tition was dismissed, *Neuschafer v. Whitley*, 0 F.2d 1470 (9th Cir.1988), *cert. denied*, 493 S. 906, 110 S.Ct. 264, 107 L.Ed.2d 214 (1989), as the law of the circuit and that under it, a ding of abuse of the writ would not have been atified solely on account of failure to include exhausted claims. *Id.* at 1476. Except to te that the district court's dismissal orders are

So far as we are aware, there is no dispositive authority one way or the other, though *Sanders v. United States*, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963) comes quite close. As the Advisory Committee Notes to Rule 9(b) reflect,[13] the Court in *Sanders* distinguished two principles: a successive application on a ground heard and denied on the merits in a prior application, and abuse of the writ.[14] *Id.* at 10, 15–19, 83 S.Ct. at 1074, 1077–79. As the Court explained with respect to the successive application claimed to be an abuse of the writ:

> No matter how many prior applications for federal collateral relief a prisoner has made, the principle elaborated in Subpart A, supra [having to do with successive applications on grounds previously heard and determined on the merits] cannot apply if a different ground is presented by the new application. So too, it cannot apply if the same ground was earlier presented but not adjudicated on the merits. In either case, full consideration of the merits of the new application can be avoided only if there has been an abuse of the writ or motion remedy; and this the Government has the burden of pleading.

Id. at 17, 83 S.Ct. at 1078. Sanders's initial petition—like Farmer's—had not been denied on the merits.[15] *Id.* at 19, 83 S.Ct. at 1079. Sanders's second application alleged a

entirely understandable responses to *Rose v. Lundy* (initial petition), *Neuschafer* (second petition), and *McCleskey* (third petition), we believe that the significance to Farmer's conduct of *Rose v. Lundy*, *Neuschafer*, *McCleskey*, and the various orders in this case, are for the district court, not us, to evaluate.

13. Quoted in full, *supra* at 1555–56.

14. We recognized both the distinction, and the fact that different standards determine when a court may dismiss a petition as abusive and when it may dismiss one as successive, in *Neuschafer*, 860 F.2d at 1474, n. 8.

15. The dissent reads *Sanders* differently, *infra* at 1562, but as the Court itself explained, Sanders's first petition "was denied because it stated only bald legal conclusions with no supporting factual allegations," and "the denial, thus based, was not on the merits. It was merely a ruling that [Sanders's] pleading was deficient." *Sanders*, 373 U.S. at 19, 83 S.Ct. at 1079.

new and different ground for relief (mental incompetency), which the district court denied without a hearing on the footing that "'there is no reason given, or apparent to this Court, why petitioner could not, and should not, have raised the issue of mental incompetency at the time of his first motion....'" *Id.* at 6, 83 S.Ct. at 1072. While holding that a hearing on the second application was required, *id.* at 20, 83 S.Ct. at 1079–80, the Court noted that "it will be open to the [government] to attempt to show that petitioner's failure to claim mental incompetency in his first motion was an abuse of the motion remedy, within the principles of *Wong Doo* and *Price v. Johnston*, disentitling him to a hearing on the merits." *Id.* at 21, 83 S.Ct. at 1080.[16] This could not have been an available option if, as Farmer contends, abuse of the writ cannot be triggered unless there has been a prior determination on the merits.

By contrast, the cases that Farmer calls to our attention have to do with subsequent petitions that involved challenges based on the "same ground," or "successive," part of *Sanders*.[17] These cases naturally cite, and rely on, the rules applicable to "same ground" successive petitions, including the requirement that there be a prior determination on the merits of the same ground against the petitioner. *Sanders*, 373 U.S. at 15, 83 S.Ct. at 1077. None limits the "new and different," or abusive part of *Sanders* to an earlier merits resolution; indeed, one case upon which Farmer relies, *Hamilton v. Vasquez*, 882 F.2d 1469 (9th Cir.1989), suggests that a petitioner *can* abuse the writ even though there has been no prior determination on the merits of a federal petition. Hamilton's first federal habeas petition was dismissed on the merits, but we reversed and ordered the petition dismissed without prejudice for failure to exhaust. Hamilton then brought a second federal habeas petition that alleged a new claim for relief. The district court rejected the state's alternative contentions that the petition should be dismissed as successive or abusive, and instead decided the merits of Hamilton's new claim against him without examining the state court record. *Id.* at 1470. We held that there was no same ground or successive petition problem, because Hamilton's first petition was dismissed without prejudice for failure to exhaust, and therefore "no federal court has yet addressed the merits of [Hamilton's] claim." *Id.* at 1473. But we also recognized that the absence of a prior merits determination wasn't dispositive of the state's alternative "abusive petition" argument, holding instead that the record did not

16. In *Wong Doo v. United States*, 265 U.S. 239, 44 S.Ct. 524, 68 L.Ed. 999 (1924), the petitioner's first application for habeas corpus presented two grounds for relief. After a hearing, during which the petitioner offered no evidence to support his second ground, the district court denied relief because the first ground "was not good in law." *Id.* at 240, 44 S.Ct. at 525. The petitioner filed a second petition and relied entirely on the second ground. Finding no reason why the petitioner could not have presented evidence to support the second ground in the first habeas proceedings, the Court affirmed the district court's dismissal of the second petition, concluding that "[t]o reserve the proof for use in attempting to support a later petition, if the first failed, was to make an abusive use of the writ of *habeas corpus*." *Id.* at 241, 44 S.Ct. at 525.

In *Price v. Johnston*, 334 U.S. 266, 68 S.Ct. 1049, 92 L.Ed. 1356 (1948), the petitioner's fourth habeas petition alleged a new claim, which the district court dismissed without a hearing on the ground that the petitioner had not raised the claim in his earlier petitions. *Id.* at 275–76, 68 S.Ct. at 1055–56. The Court explained that the new claim could be an abuse of the writ, and remanded to the district court to afford the government an opportunity to plead abuse with particularity, and to give the petitioner a chance to prove: (1) that he lacked any knowledge of the facts necessary to state the claim in one of his earlier petitions; or (2) if he had the knowledge, that he had an excuse for not asserting the claim. *Id.* at 291–92, 68 S.Ct. at 1062–63.

17. *See Hutchinson v. Craven*, 415 F.2d 278, 280 (9th Cir.1969) (per curiam); *Tatum v. Christensen*, 786 F.2d 959, 964 n. 6 (9th Cir.1986), *overruled in part on other grounds*, 802 F.2d 1539 (9th Cir.1986) (en banc); *Richmond v. Lewis*, 948 F.2d 1473, 1480–81 (9th Cir.1990), *rev'd on other grounds*, 506 U.S. 40, 113 S.Ct. 528, 121 L.Ed.2d 411 (1992); *Campbell v. Blodgett*, 997 F.2d 512, 515–17 (9th Cir.1992), *cert. denied*, 510 U.S. 1215, 114 S.Ct. 1337, 127 L.Ed.2d 685 (1994); *Hill v. Lockhart*, 894 F.2d 1009, 1010 (8th Cir.) (en banc), *cert. denied*, 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed.2d 767 (1990); *Potts v. Zant*, 734 F.2d 526, 528–29 (11th Cir.1984), *cert. denied*, 475 U.S. 1068, 106 S.Ct. 1386, 89 L.Ed.2d 610 (1986).

upport a finding that an abuse had in fact ccurred:

> A federal court need not consider habeas claims previously unlitigated in federal court if it determines that the petitioner (1) made a conscious decision deliberately to withhold them from a prior petition, (2) is pursuing needless piecemeal litigation, or (3) has raised the claims only to vex, harass, or delay. Where there is no affirmative indication in the record that the petitioner made a conscious decision deliberately to withhold his claim, proceed by piecemeal litigation, to vex or harass or annoy the court or the state, a second petition raising a new claim is not an abuse of the writ.
>
> The state has presented no evidence that any of the factors outlined in *Sanders* are present. Moreover, there is nothing in the history of this case to indicate that Hamilton deliberately withheld his claim in the hope of being granted two hearings instead of one.

. (citations omitted).

Farmer also argues that the state must ege that there was a prior proceeding on e merits as part of its burden to invoke the use of the writ doctrine, citing *Watkins v. ampion*, 39 F.3d 273 (10th Cir.1994). It is t clear to us where this comes from, as *itkins* simply says that, in accordance with *:Cleskey*, the government bears the burden pleading abuse of the writ, *id.* at 275, ich the government satisfies if it "notes itioner's prior writ history, identifies the ims that appear for the first time, and ges that petitioner has abused the writ." *Cleskey*, 499 U.S. at 494, 111 S.Ct. at 0.

dore critically, Farmer contends that *Cleskey* itself incorporates the necessity of rior proceeding on the merits of a previ- federal petition based on the emphasis t the Court gives to the burdens of "'re-examination of a conviction' following a first round of federal habeas litigation," as he puts it, and to "endless repetition of inquiry into facts and law," as the Court notes in quoting Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners", 76 Harv.L.Rev. 441, 452–453 (1963). *McCleskey*, 499 U.S. at 491–92, 111 S.Ct. at 1468–69.[18] From these concerns Farmer infers that the policies prohibiting repetitive examination of a state conviction do not apply when there has been no initial examination of the merits of the case by the federal court.

We do not read *McCleskey* as speaking to the point one way or the other. While there had been a prior determination on the merits in McCleskey's case, that wasn't a factor in the Court's decision about what standard should govern in abuse of the writ cases. But the Court's explanation for why it was appropriate to meld the standards for procedural default and abuse of the writ, and its focus on the petitioner's conduct, undermines the premise of Farmer's argument:

> The prohibition against adjudication in federal habeas corpus of claims defaulted in state court is similar in purpose and design to the abuse-of-the-writ doctrine, which in general prohibits subsequent habeas consideration of claims not raised, and thus defaulted, in the first federal habeas proceeding. The terms "abuse of the writ" and "inexcusable neglect," on the one hand, and "procedural default," on the other, imply a background norm of procedural regularity binding on the petitioner. This explains the presumption against habeas adjudication both of claims defaulted in state court and of claims defaulted in the first round of federal habeas. A federal habeas court's power to excuse these types of defaulted claims derives from the court's equitable discretion.... For these reasons, both the abuse-of-the-writ doctrine and our procedural default jurispru-

In the cited passage, the Court states:

> If reexamination of a conviction in the first round of federal habeas stretches resources, examination of new claims raised in a second or subsequent petition spreads them thinner still. These later petitions deplete the resources needed for federal litigants in the first instance, including litigants commencing their first federal habeas action.... And if reexamination of convictions in the first round of habeas offends federalism and comity, the offense increases when a State must defend its conviction in a second or subsequent habeas proceeding on grounds not even raised in the first petition.

Id. at 492, 111 S.Ct. at 1469.

dence concentrate on a petitioner's acts to determine whether he has a legitimate excuse for failing to raise a claim at the appropriate time.

Id. at 490, 111 S.Ct. at 1468 (citations omitted).

So does the Court's formulation of the question in abuse of the writ cases:

> Abuse-of-the-writ doctrine examines *petitioner's* conduct. The question is whether petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition and pursue the matter through the habeas process. The requirement of cause in the abuse-of-the-writ context is based on the principle that petitioner must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition.

Id. at 498, 111 S.Ct. at 1472 (citations omitted). We thus do not agree with Farmer that *McCleskey* itself indicates that abuse can only occur as a matter of law after a federal court has addressed the merits of a previous petition.

[8, 9] We hold that a district court is not precluded as a matter of law from considering whether a petitioner has abused the writ by alleging in a subsequent federal habeas petition new and different grounds from those alleged in a prior federal habeas petition, whether or not that prior petition was determined on the merits. However, we emphasize how narrow this holding is. It does not mean that Farmer will never have any of his grounds heard on the merits in federal court. Claims that were presented in his initial and second federal habeas petitions but were not determined on the merits because they were unexhausted, are clearly outside Rule 9(b). Nevada acknowledges that all of Farmer's exhausted claims presented in the amended third petition should be heard, no doubt recognizing that a "single" federal petition filed after *Rose v. Lundy* exhaustion cannot be an abuse of the writ, as it is the very reason for dismissing the petition for failure to exhaust in the first place. Farmer's claims may not in any event be "new and different," or abusive. In short, what we hold, and all that we hold, is that the district court was not precluded as matter of law from considering whether Farmer's conduct in failing to allege grounds in prior petitions that he alleged the third time around (if he did) was abusive solely on account of the fact that his prior petitions were not reviewed on the merits.

Rather, the possibilities are as *Sanders* first articulated, Rule 9(b) sets out, the Advisory Committee Notes reflect, and as the Court restated in *Sawyer v. Whitley*, 505 U.S. 333, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992):

> Unless a habeas petitioner shows cause and prejudice, a court may not reach the merits of: (a) *successive claims* which raise grounds identical to grounds heard and decided on the merits in a previous petition; (b) new claims, not previously raised which constitute an *abuse of the writ;* or (c) *procedurally defaulted claims* in which the petitioner failed to follow applicable state procedural rules in raising the claims. These cases are premised on our concerns for the finality of state judgments of conviction, and the significant costs of federal habeas review.

Id. at 338, 112 S.Ct. at 2518 (internal quotation and citations omitted).

IV

Accordingly, we reverse because Rule 9(b) and *McCleskey* do not foreclose entertaining the state's motion to dismiss for abuse of the writ solely because Farmer's prior petition had not been determined on the merits, as the district court concluded. We therefore vacate its order dismissing Farmer's amended third petition, and remand for it to consider the state's motion to dismiss for abuse of the writ. However, we express no opinion on whether the grounds alleged in Farmer's amended third petition are "new and different," or if they are, whether there has been any abuse of the writ. That is entirely for the district court to decide, in its discretion.[19]

19. Nevada alternatively asks us to conclude that the district court should have ruled that all 27 claims contained in Farmer's amended third petition are procedurally barred. But for the same

REVERSED; VACATED AND REMANDED.

SCHROEDER, Circuit Judge, concurring part and dissenting in part:

I concur in the holding that we have jurisdiction to consider the appeal, but I respectfully dissent from the majority's remand to the district court to consider possible abuse of the writ. The majority holds that inclusion of unexhausted claims in petitioner's third amended petition may constitute abuse, even though Farmer has never had a determination on the merits of any of his habeas claims. In my view, the district court has skillfully negotiated the hairpin turns in prevailing habeas corpus jurisprudence over the past decade in order to bring Farmer to the point where he can bring all of his claims to resolution in one petition. I would affirm the district court's order denying Nevada's motion to dismiss for abuse of the writ, for two reasons.

I.

First, even assuming the majority is correct in holding that there can be an abuse of the writ pursuant to Rule 9(b) of the Federal Habeas Corpus Rules when there has never been a prior adjudication on the merits, this particular case is not one in which such a finding of abuse could be made. There is no doubt Farmer's first two petitions containing exhausted claims were properly dismissed under *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982). Pursuant to this court's then-controlling decision in *Neuschafer v. Whitley*, 860 F.2d 1470 (9th Cir. 1988), the filing of a later petition in order to raise claims that had not been exhausted at the time a first federal petition was adjudicated could not, as a matter of law, have constituted an abuse of the writ because there had been no deliberate withholding of claims. Thus, after the dismissal of the second petition in this case, Farmer could have proceeded to have only his exhausted claims decided in a new petition without forfeiting unexhausted claims.

By the time Farmer filed his third petition, that law had changed. The Supreme Court had held in *McCleskey v. Zant*, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991) that a petitioner who filed a second § 2254 petition raising a new claim not decided in his earlier petition had abused the writ. The petitioner would not be permitted to obtain a hearing on the merits of the new claim unless he established "cause and prejudice." The district court therefore correctly recognized that under *McCleskey*, once Farmer obtained a hearing on the merits of any of his claims, he could no longer easily return to federal court on a new petition raising claims that were not exhausted when the earlier petition was filed. This is why the district court gave Farmer six months to file a new federal petition raising all claims.

When that third amended petition still contained unexhausted claims that would require dismissal pursuant to *Rose v. Lundy*, the district court wisely, in my view, decided the proper course was to dismiss without prejudice and place strict time limits on the filing of a state court petition in order to allow the state courts to determine whether the unexhausted claims were valid, invalid or, as Nevada had insisted, procedurally barred.

Both the filing of the third amended complaint and the district court's dismissal of it without prejudice were done in accordance with prevailing law in order to satisfy the requirements of *Rose v. Lundy* and *McCleskey v. Zant*. There is no basis in this record to support the state's assertion that the third amended complaint was filed only to vex, harass, and delay. Indeed, the Supreme Court in *Sanders v. United States*, 373 U.S. 1, 22–23, 83 S.Ct. 1068, 1081, 10 L.Ed.2d 148 (1963) encouraged the district courts to refrain from deciding petitions on the merits until all possible claims were before them.

reasons we will not decide whether Farmer has in fact abused the writ, we decline to resolve this procedural default issue, and instead leave it to the district court on remand. *See Grey v. Hoke*, 933 F.2d 117, 120 (2d Cir.1991) (deeming petition exhausted, and therefore properly dismissed, where petitioner's claims were now procedurally barred from presentation to state court); *see also Moran v. McDaniel*, 80 F.3d 1261, 1269–70 (9th Cir.1996) (rejecting an argument that Nevada's procedural bar rules are not adequate, and concluding that "the Nevada Supreme Court consistently applies its procedural rules to bar review of the merits of an untimely claim in the absence of a showing of cause and lack of prejudice to the State.").

That is exactly what the district court did in this case. The remand is unnecessary.

II.

Second, the district court in my view correctly held as a matter of law that there could not be an abuse of the writ under Rule 9(b) when there has never been an adjudication of any prior claim on the merits. In reversing, the majority correctly recognizes that Rule 9(b) was promulgated to reflect principles enunciated in *Sanders v. United States*, *supra*, but then gets *Sanders* wrong.

The majority's analysis depends on the premise that *Sanders* itself involved a case where a previous habeas petition had not been decided on the merits. *See* majority op., pp. 1557–58. I do not believe that premise is accurate.

Sanders involved a second petition. In his first petition, Sanders alleged that the indictment was invalid, that he was denied effective assistance of counsel, and that his guilty plea was involuntary. *Sanders*, 373 U.S. at 5, 83 S.Ct. at 1071. Sanders made insufficient factual allegations in support of his claims. *Id.*, 83 S.Ct. at 1072. The district court, however, did not simply deny the petition because of the absence of supporting factual allegations; it also held that the court records affirmatively refuted Sanders' three claims for relief. *Id.* That was an adjudication on the merits. See *id.* at 16, 83 S.Ct. at 1077, explaining that in order for there to be a ruling on the merits for abuse purposes, the court must either refute the allegations from its own records or hold a hearing. The Court said that an "adjudication on the merits" in a prior application means that "if factual issues were raised in the prior application," then either the application was "denied on the basis that the files and records conclusively resolved these issues," or "an evidentiary hearing was held." *Id.*

The concept of abuse of the writ is a subset of the larger realm of *res judicata* claim preclusion. While prior habeas determinations have less preclusive effect than ordinary judgments, they do have some preclusive effect. *See id.* at 8–11, 83 S.Ct. at 1073–75 (citing and discussing *Salinger v. Loisel*, 265 U.S. 224, 44 S.Ct. 519, 68 L.Ed. 989 (1924); *Wong Doo v. United States*, 265 U.S. 239, 44 S.Ct. 524, 68 L.Ed. 999 (1924); *Price v. Johnston*, 334 U.S. 266, 68 S.Ct. 1049, 92 L.Ed. 1356 (1948)). It is hornbook law that a prior judgment does not have preclusive effect unless it is a decision on the merits. *See* Restatement (Second) of Judgements §§ 13 & 20 (1982); *Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 466 n. 6, 102 S.Ct. 1883, 1889 n. 6, 72 L.Ed.2d 262 (1982). The Supreme Court underscored this point recently in *Felker v. Turpin*, — U.S. —, —, 116 S.Ct. 2333, 2340, 135 L.Ed.2d 827 (1996), where it stated that "restrictions on successive petitions constitute a modified res judicata rule, a restraint on what is called in habeas corpus practice 'abuse of the writ.'" The majority decision is thus contrary to basic claim preclusion principles.

The majority's reliance on *Hamilton v. Vasquez*, 882 F.2d 1469 (9th Cir.1989), and *Sawyer v. Whitley*, 505 U.S. 333, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992), is not convincing. In *Hamilton* we did not, as the majority opinion states, "recognize[ ] that the absence of a prior merits determination wasn't dispositive of the state's alternative 'abusive petition' argument." Majority op. p. 1558. Instead, we decided the abuse of the writ argument on the merits because neither party raised the question whether there can be an abuse absent a prior adjudication on the merits. 882 F.2d at 1473. We did not deal with the issue presented here. The language quoted from *Sawyer*, on page 1560 of the majority's opinion, is not persuasive because *Sawyer* concerned the "miscarriage of justice" exception to the bar against consideration of successive claims, and not whether a successive claim may constitute an abuse of the writ. *Sawyer*, 505 U.S. at 339–40, 112 S.Ct. at 2518–19.

Apart from *Sanders*, neither the majority opinion nor the state cites any case in which it is even suggested that Rule 9(b) authorizes finding an abuse when there has been no prior decision on the merits. The principles enunciated in *Sanders* were drawn from an extensive discussion of prior cases, all of which considered an earlier decision on the merits to be a prerequisite to consideration of any government claim of abuse in a successive petition. In *Wong Doo v. United States*, 265 U.S. 239, 239–40, 44 S.Ct. 524, 25, 68 L.Ed. 999 (1924), the petitioner raised wo grounds for relief in his first federal abeas petition, but withheld any proof on he second ground and lost on the merits. ater, he filed a second petition, relying exlusively on the second ground alleged in the irst petition. *Id.* at 240, 44 S.Ct. at 525. 'he Supreme Court observed that petitioner ad not offered any "reason for not presentng the proof at the outset," and held that [t]o reserve the proof for use in attempting o support a later petition, if the first failed, as to make an abusive use of the writ of abeas corpus." *Id.* at 241, 44 S.Ct. at 525.

Price v. Johnston, 334 U.S. 266, 68 S.Ct. 049, 92 L.Ed. 1356 (1948), also involved a rior adjudication on the merits. In *Price*, ie petitioner raised a new claim for relief in is fourth successive federal habeas petition. *l.* at 286, 288–89, 68 S.Ct. at 1060, 1061–62. he Supreme Court remanded for a determiation of whether the petitioner abused the rit by failing to raise this new claim in his arlier petitions, two of which had been deied on the merits. *Id.* at 290–94, 68 S.Ct. at)62–1064.

In addition to *Wong Doo* and *Price*, the pinion in *Sanders* drew heavily from *Salinr v. Loisel*, 265 U.S. 224, 44 S.Ct. 519, 68 .Ed. 989 (1924), which also concerned sucssive federal habeas petitions. *See Sand*s, 373 U.S. at 8–9, 83 S.Ct. at 1073–74. *anders* noted that in *Salinger*, "[t]he petiioner's successive applications were properly enied because he sought to retry a claim reviously fully considered and decided gainst him." *Id.* at 9, 83 S.Ct. at 1074. The *alinger* Court observed that

[t]he action of the court or justice on the second application will naturally be affected to some degree by the character of the court or officer to whom the first application was made, and the fullness of the consideration given to it.

5 U.S. at 231–32, 44 S.Ct. at 522 (quoting *x parte Cuddy*, 40 F. 62, 66 (1889)). Clear, *Salinger*, like *Wong Doo* and *Price*, reuired a prior habeas adjudication on the erits.

Our overall concern should be with making abeas corpus procedures more efficient, orrly and understandable. The Supreme ourt and Congress have insisted that all abeas claims be consolidated insofar as practicable and that they be promptly resolved. The latter goal can never be achieved in this case. That is beyond our control. What is within our control is to let the district court proceed to adjudicate a consolidated petition. The majority refuses to do this and instead issues an open invitation to respondents in habeas cases to file more motions and to all parties to file more appeals. Let's stop making more work for the courts and doing less justice for litigants in habeas cases.

Because there is no factual basis to suggest the third amended complaint was filed for vexatious purposes, and for the independent reason that, as a matter of law, I believe the district court correctly recognized there can be no abuse under Rule 9(b) unless there has been a prior adjudication on the merits, I respectfully dissent from the order remanding for a determination of whether there has been an abuse of the writ.

APPLIED MATERIALS, INC.,
Plaintiff/Cross–Appellant,

v.

ADVANCED SEMICONDUCTOR MATERIALS AMERICA, INC. and Epsilon Technology, Inc., d/b/a ASM Epitaxy, Defendants–Appellants,

and

Advanced Semiconductor Int. N.V., Defendant.

Nos. 94–1428, 94–1466.

United States Court of Appeals, Federal Circuit.

Oct. 24, 1996.

Rehearing Denied; Suggestion for Rehearing In Banc Declined Dec. 17, 1996.*

Patentee brought action against competitor, alleging infringement of patents relating

*Chief Judge Archer would rehear the appeal.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

ANTONIO T. SLACK,

Petitioner,

vs.

DIRECTOR, NDOP, et al.,

Respondents.

Case No. CV-N-95-194-DWH

OPPOSITION TO MOTION FOR APPOINTMENT OF COUNSEL

Respondents, by an through counsel, FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada, oppose petitioner's motion for appointment of counsel.

This opposition is made and based on the attached points and authorities as well as all other pleadings, documents and exhibits on file in the above-entitled matter.

POINTS AND AUTHORITIES

Petitioner Antonio T. Slack (hereinafter SLACK) has filed a motion for counsel stating that he is illiterate. This assertion is belied by the pleadings that Slack has already filed in this matter. Slack acknowledges that he is receiving the benefit of the services of inmate law clerks. He is entitled to nothing more. Whether his claims have merit or not is up to this Court to determine. Slack is not constitutionally entitled to counsel in this proceeding and he has advance no reason why he can not litigate the matter himself. Respondents respectfully suggest that this Court should not waste scarce judicial resources.

RESPECTFULLY SUBMITTED this 7th day of July, 1995.

FRANKIE SUE DEL PAPA
Attorney General

By: Robert E. Wieland
Robert E. Wieland
Deputy Attorney General
Criminal Justice Division
(702) 687-3529

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General of the State of Nevada and on this 10th day of July, 1995, I served a copy of the foregoing OPPOSITION TO MOTION FOR APPOINTMENT OF COUNSEL, by mailing a copy thereof to:

ANTONIO T. SLACK, #31395
Ely State Prison
P.O. Box 1989
Ely, Nevada 89301-1989

Dani L Doty

98-6322

CASE NO._____

CASE CODE CFH

DATE DOCKETED 10-5-98

SHORT TITLE_____

FULL TITLE _____

COURT FROM 9CAP9

DATE DECIDED BELOW 7-7-98

DATE REHARING DENIED_____

DATE DR. DENIED_____ DATE DR REH DENIED_____

CASE NUMBER BELOW 98-15943

OTHER COURT USNV

CAPITAL CASE_____

TIME QUESTION_____

APPLICATION EXTENSION_____ CITED __Y ___N_____

RULE 12.2_____

DKT LETTER NOTATION_____ SERVE SG_____

MULTI PARTY_____ TS_____ BS_____

RELATED CASE SCHEDULED FOR CONFERENCE_____

RELATED CASE NO. HAS BEEN DENIED_____

VIDE_____

THE PETITION FOR A WRIT OF CERT WAS DUE_____

BECAUSE THE PETITION WAS POSTMARKED_____

AND RECEIVED _____ IT WAS DOCKETED WITH

A NOTATION AS TO ITS UNTIMELINESS.